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FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-634

In re Applications of

AB Partners, Ltd.	File No. BPH-881215MI
BEBE-F Broadcasting Corp.	File No. BPH-881215NE
Baker Communications Partnership	File No. BPH-881215NN

For Construction Permit for a
New FM Station on Channel 297A
(107.3 MHz)
in Baker, Louisiana

APPEARANCES

Michael R. Miller on behalf of AB Partners, Ltd.; *Richard J. Bodorff*, *Jonathan W. Emord*, and *Kenneth D. Ebanks* on behalf of BEBE-F Broadcasting Corp.; *J. Richard Carr* and *Audrey L. Allison* on behalf of Baker Communications Partnership; and *Y. Paulette Laden* for the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE WALTER C. MILLER

Issued: February 14, 1992; Released: February 24, 1992

FINDINGS OF FACT

1. Originally seven applicants sought authority for a new FM station on Channel 297A (107.3MHz) in Baker, Louisiana.[1] Three remain: (1) AB Partners, Ltd.; (2) BEBE-F Broadcasting Corp.; and (3) Baker Communications Partnership.

2. After the interlocutory cycle had run its course, only one factual issue (the standard comparative issue) and the ultimate conclusionary issue remained. So we took evidence on these two issues (see 56 F.R. 4290 published February 24, 1991):[2]

> "1. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> "2. To determine in light of the evidence adduced pursuant to the specified issue, which of the applications should be granted, if any."

3. An additional matter must be considered under the standard comparative issue. The Chief, Audio Services Division has called for comparative coverage evidence. *See* 56 F.R. 4290 *supra*. at para. 10.

4. We held the Prehearing Conference on April 30, 1991, the Evidentiary Admission Session on May 14, 1991, and the Hearing on June 3-4, 1991. We closed the record on June 4, 1991.

5. The three applicants, along with the Mass Media Bureau, filed their Proposed Findings of Fact and Conclusions of Law on August 8, 1991.[3] The three applicants each filed Reply Findings on August 19, 1991.

Issue 1: The Standard Comparative Issue
Description of the Applicants

6. *AB Partners* (AB) is a Louisiana limited partnership.[4] It consists of three partners: (1) Charles Alexander, a general partner with a 30% equity interest; (2) Michael Barnes a limited partner with a 35% equity interest; and (3) Henry Harris, a limited partner with a 35% equity interest.

7. *BEBE-F Broadcasting Corporation* (BEBE) is a two-tier Louisiana corporation. They were incorporated on December 15, 1988, and the following chart shows the ownership as of the "B" cut-off date:

CHART

Stock-holder	Stock Held	Equity Interest
Beatriz Facundus	25 shares of voting stock	25%
Arthur M. Hoover III	25 shares of non-voting stock	25%
Grey Hammett	15 shares of non-voting stock	15%
John Barton	5 shares of non-voting stock	5%
John F. White	15 shares of non-voting stock	15%
Melvin Lee Holden[5]	15 shares of non-voting stock	15%

8. *Baker Communications Partnership* is a Louisiana general partnership. It consists of three partners: (1) Albert G. Carson, IV has a 50% equity interest; (2) Lucille M. Hall owns a 45% equity interest; and (3) Charles R. Hall, Sr. has a 5% equity interest. Charles and Lucille Hall are husband and wife.

The Filing Background Of The Applicants

9. *AB*. The formulator and driving force behind AB's application is Limited Partner, Michael Barnes. He lives in Guy Mills, Pennsylvania, and is in the real estate and coal business. He was once a football player in the NFL. Barnes is a White, non-Hispanic male.

10. General Partner Charles Alexander is from Baton Rouge, Louisiana. From 1974-1978 he attended Louisiana State University (LSU), and played football there. The Cincinnati Bengals drafted him in 1979, and he played

professional football in the NFL from 1979 to 1986. Since January 18, 1988, Alexander has been an academic advisor for athletics at LSU. Alexander is a Black, non-Hispanic male.

11. Henry Harris lives in Lexington, Kentucky, and is in the property management business. Barnes and Harris have been close social friends for about twenty years. They talk with one another by telephone two or three times a week. They share information about their respective businesses.

12. However, Alexander has not met Harris and knows nothing about him except what Barnes has told him. Harris knows nothing about Alexander except that he was a professional football player, and he gathered that from the media. In fact, Harris invested in the Baker venture on the assumption that Barnes, not Alexander, would make sure that everything was "done properly" (Tr. 264). Harris is a White, non-Hispanic male.

13. Barnes and Alexander first met in the early fall of 1988 at an LSU-Miami football pre-game party. John Symak from LSU's athletic department, introduced Barnes to Alexander. They discussed their respective careers in the NFL and what they had done since. Before then Alexander knew nothing about Barnes or his background. During the conversation Alexander told Barnes that he was dissatisfied with his job and wanted to do other things. At this first meeting Barnes didn't mention the Baker, Louisiana channel.

14. A short time later, about two months before the Baker filing deadline, and before he talked to Alexander, Barnes recruited Harris as a limited partner in the Baker venture. He told Harris about the channel being available, and that it would be a good idea to have someone of a minority race as general partner (Tr.220, 238, 260). He also mentioned to Harris that local residence was also an advantageous characteristic. During this conversation Barnes also mentioned that he was involved in an FM application for Monroe, Louisiana, and he may also have mentioned that he (Barnes) was also involved in broadcast station applications for Orlando, Florida and Pueblo, Colorado.[6] In any event, Harris was aware of Barnes' other broadcast activities.

15. About a month to six weeks after Barnes and Alexander met (see Finding 13 *supra*.). Alexander unexpectedly received a telephone call from Barnes. Barnes told Alexander that a new FM channel had become available in Baker and asked him if he (Alexander) would like to get involved in a limited partnership that would apply for the channel. He told Alexander that he (Barnes) was interested in putting together a "group that was competitive" (Tr. 326; 327); and that Alexander's race and civic involvement in the community of license would be helpful in that regard.

16. Before he committed himself to the project, Alexander contacted John Symak (Finding 13 *supra*.) and another mutual friend of Barnes and Alexander, John Woodley, to find out more about Barnes. In another pre-filing conversation Barnes told Alexander that he (Alexander) would have a 30% equity interest in the limited partnership. At the hearing Alexander first said that he and Barnes had "negotiated" the 30% figure. But he then quickly admitted that Barnes had told him that he (Barnes) had promised Harris 35%, and that he (Barnes) wanted 35%, so that left 30% for Alexander. Harris says that Barnes had told him that he and Barnes would get a 35% equity interest, while Alexander would only get 30%.

17. Barnes' testimony contradicts both Alexander and Harris on this point. Barnes says that he drafted the AB Limited Partnership Agreement on his own word processor; that he (Barnes) had intended that he, Alexander and Harris to each get a 33 1/3% interest in the partnership; but that his word processor made a "misprint" resulting in the 35%, 35%, and 30% breakdown.[7]

18. Barnes sent Alexander a copy of the AB Limited Partnership by mail. Barnes' signature was already affixed. Alexander didn't have an attorney review the agreement; he read it over and signed without making any changes and sent it back to Barnes. Under the partnership agreement Alexander (although he's the General Partner) is not obligated to pay partnership liabilities. If he advances any funds on behalf of the partnership, those advances are considered loans repayable to him, not capital contributions to the partnership. However, under the agreement Alexander can be removed by a majority vote of the limited partners upon a determination of good cause for removal.

19. One cannot fully appreciate the power Barnes has over the AB Partnership until one examines the relationship between Barnes and AB communications counsel, Michael Miller. Miller is a social friend of Barnes as well as his communications attorney. He also provides Barnes with personal legal services (Tr. 350). They have known one another for about 15 years.

20. Barnes, in addition to this Baker venture, is or was in four other broadcast applications. Miller served as Barnes' counsel in those applications. Miller served as Barnes' counsel in those applications as well representing the applicants. Barnes' method of operation is basically always the same; i.e., one of a limited partner or non-voting principal coupled with a minority general partner or voting principal with local residence, and civic activity.

21. Barnes first became involved in broadcast applications back *on May 7, 1986*. Michael Miller told Barnes that there was an opportunity to apply for an FM station in Orlando Florida. Miller, in consultation with Barnes, structured a limited application for Orlando; i.e., Bristol Communications Limited. Miller also selected a general partner for Bristol, Dorothy McCaskell. Ms. McCaskell was a black female and a local resident of Orlando. Barnes had a 60% equity in Bristol and provided all the financing for the applicant. At that time Barnes was well aware that Ms. McCaskell's selection would ensure a "competitive case." The Bristol application was dismissed under a settlement agreement. Bristol received a six-figure settlement amount.

22. About two years later, *on April 19, 1988*, Barnes became a limited partner in Delta Broadcasting of Louisiana. Delta is an applicant for a new FM station in New Orleans. John Carnes, a New Orleans resident is Delta's General Partner.

23. Less than two months later, *on June 2, 1988*, Monroe Communications, Ltd. filed an application for a new FM station in Monroe, Louisiana. Barnes was the limited partner in the application and exclusively financed the applicant's expenses. Michael Miller was the applicant's attorney. The applicant had two general partners, Lane

and Dulles Howell. Both were black and local residents of Monroe with some civic involvement. The Monroe applicant was dismissed, but no settlement was involved.

24. About two and half-months later, *on August 25, 1988*, Two Rivers Broadcasting, Inc. applied for a new FM station in Pueblo, Colorado. This application is still pending. Barnes is the applicant's sole non-voting stockholder. The applicant's sole voting stockholder is a Harry Reyes, an Hispanic male, and a Pueblo resident with civic involvement in the community. Barnes found Reyes by contacting a friend of his named Dave Orvis. He told Orvis he needed someone who could give him a "winning case" in Pueblo, and Orvis identified Reyes. Barnes paid all of the applicant's expenses. Barnes had no prior business or social relationship with Reyes.

25. As previously noted (Footnote 4) Alexander (the general partner) did not file AB's limited partnership agreement with the Secretary of State until March 15, 1991. Even then, the filing was at Michael Miller's instructions. It was Miller, not Alexander, who obtained AB's transmitter through the use of the site acquisition firm, Schaffer and Associates (Tr. 159). It was Miller, not Alexander, that retained the services of AB's consulting engineer. Alexander has never talked to AB's consulting engineer.

26. It was Miller who drafted AB's application for a construction permit. He sent it to Alexander who signed it, making no changes. As noted (Finding 17 *supra*.), Barnes drafted AB's Limited Partnership Agreement on his own word processor. The form Partnership Agreement he used originally came from Miller's office. It was the same partnership form agreement he used for his Monroe, Louisiana application.

27. In fact, Barnes would have had Miller draft AB's partnership agreement, but he couldn't reach Miller and believed he was running out of time to get the application ready for filing.

28. Putting Miller's substantial role aside, the further findings are warranted that the so-called General Partner, Charles Alexander, has had next to nothing to do with the prosecution of AB's application. He had nothing to do with the preparation of AB Exhibit 1 (other media interests) or AB Exhibit 2 (Program Service). He never saw the engineering section until he received it from Miller, and he isn't even sure the engineering section was before him when he signed it. It was Barnes and Harris, not Alexander, who created AB's budget.

29. AB bases its financial certification on a letter dated December 12, 1988 (three days before AB filed its application) from Harris to Alexander. Alexander didn't ask Harris to prepare the letter and wasn't involved in its drafting. It was Barnes who told Harris that AB needed the financing letter. Harris prepared the letter pursuant to Barnes' instructions. Alexander realizes that if the loan provided for in the letter is not repaid, the station permit would be transferred to Harris.

30. Under the loan letter Alexander (the general partner) would have to file a formal loan application with Harris (one of the limited partners), before a final determination to funding could be made. Funding is also conditioned on no change in the financial condition of AB's investment partners. The loan letter further requires Alexander "and/or your partners" to personally guarantee the loan. As of March 20, 1991 (the date he was deposed) Alexander hasn't given either an oral or written assurance to Harris consenting to provide his personal guarantee. On the contrary, Alexander believes that the limited partnership agreement constitutes the "personal guarantee."

31. Alexander has never provided Harris with a personal financial statement. He did talk to Harris "a little bit" for the first time about his net worth the evening before the hearing.

32. As between Barnes and Harris, Barnes believes he told Harris that he would guarantee his pro rata share of applicant expenses. He (Barnes) believes that Harris knew he was "good for" 35%, but at that time he couldn't stand on a stack of bibles and swear to it (Tr. 339-340).

33. Barnes has never provided Harris with a personal financial statement; Harris has never provided Alexander with a copy of his personal financial statement; and Barnes hasn't seen a copy of Harris' personal financial statement in recent years but did see one sometime in the past.

34. As of March 20, 1991 (the deposition date), only Barnes and Harris had made capital contributions to the partnership. But Alexander has paid about $600 for two public notices and to have the partnership recorded with the Louisiana Secretary of State (Tr. 181 and Finding 25 *supra*.). As of March 20, 1991, the partnership had no bank account. Barnes and Harris paid the bills directly. The General Partner Alexander does not receive bills; they go directly to Barnes and Harris (Tr. 139).

35. After the depositions were taken, Barnes told Harris that they would need to open up a bank account. In April of 1991, AB opened a bank account for the first time. Harris, Barnes, and Alexander are all signatories on the account. They all signed as "partners." Other than the initial deposit to open the account, no subsequent deposits have been made, and Alexander has made no withdrawals. No partnership expenses have been paid from the account. In fact, until the eve of hearing, no records were maintained on expenses paid by the partnership.

36. Engineering bills are sent to Michael Miller (Findings 19-21 and 25-27 *supra*.). Barnes wires counsel the money to pay these bills. Barnes also wires money to Miller to pay legal expenses, such as the application filing fee. Harris paid the hearing fee. Barnes has kept Harris informed of bills for services rendered.

37. After AB filed its application, Alexander periodically called Barnes to check on the status of the application and to find out what progress has been made. Barnes speaks frequently with Miller. It is Miller who keeps Barnes appraised of the proceeding's progress.

38. *BEBE-F Broadcasting Corporation*. As noted (Finding 7 *supra*.) BEBE's stock certificate was issued on December 15, 1988, and BEBE's corporate stock was issued on the same date. Beatriz Facundus is BEBE's sole voting stockholder. She holds all 25 shares of the issued and outstanding voting stock. She also owns 15 shares of non-voting stock which she purchased from John F. White on April 22, 1991 (see Finding 7 *supra*.) for $8,745. When her voting and non-voting interests are taken together, Beatrice Facundus has a 47.06% equity in BEBE.

39. Mrs. Facundus has voted herself president and secretary of BEBE, and has appointed herself BEBE's sole director. As the sole voting shareholder, and sole director, only Mrs. Facundus is entitled to vote.

40. There is no question that Beatriz Facundus has been and will control BEBE's destiny. It was she who decided to have the corporation buy out Melvin Holden when he

couldn't meet one of her capital calls (see Footnote 5). She also made the decision to personally buy out John F. White when he decided to leave the corporation (see Finding 38 *supra*.).

41. At the time the corporation was being formed, Mrs. Facundus called a meeting of all the potential investors at her home. Hammett, Barton, White, Holden, and Hoover attended that meeting in late November or early December 1988. She introduced herself, told them who she was, what she had done in business, how long she had been in the Baton Rouge area, how she perceived the broadcasting business, and how the business was going to be structured if she was going to have anything to do with it.[8]

42. Grey Hammet (see Finding 7 *supra*.) recalled the meeting:

> "Basically, she laid it on the line that if we were going to invest in this, she was going to run it, she was going to keep very accurate books because she would be calling for money at any time. The capital calls did come quick, and she expected her money very quickly."

43. Arthur Hoover (see Finding 7 *supra*.) said that Mrs. Facundus made it clear from the "very first" that the Baker application was to be "her project." He added "she said that whenever she gets involved in a business, if she gets involved in a business, it is something she had to have control over."

44. Beatriz Facundus retained both local (Charles Spencer) and FCC counsel for BEBE, and she retained David Steele to serve as their engineer. She discussed her business plan and various preliminary matters with Spencer. But before she told Spencer to go forward with the application's preparation, she called her personal attorney, Thomas Benton. She discussed with him the various matters she had discussed with Spencer. Benton recommended that Mrs. Facundus form a corporation. Mrs. Facundus then told Spencer to go forward with the application and to coordinate with Benton on the corporate aspects.

45. Mrs. Facundas drafted BEBE's application. She received a copy of the application form from Charles Spencer, she familiarized herself with it, and as best she could she wrote in the answers to it at her home. She then went to Charles Spencer's office, and he helped her complete it in final form.

46. She worked with Spencer to find out about the other media interests of her non-voting stockholders so that Exhibit 1 to her application could be completed. While Spencer drafted Exhibit 2 to the application (the programming statement), Mrs. Facundus read it over and approved the language that was used. She premised that approval on whether it conveyed the message she intended.

47. Mrs. Facundus negotiated the site agreement that ensured the availability of a transmitter site for BEBE. With the assistance of Spencer, and a list of costs from an equipment supplier (Parcom), she estimated both the construction and equipment costs and the first three months operating costs. She has arranged for the financing that underlies BEBE's financial certification.

48. Mrs. Facundus has paid her *pro rata* share of BEBE's expenses, has initiated all capital calls, and has required all other stockholders to pay their *pro rata* shares (Tr. 475).

49. None of BEBE's other principals have had any involvement in the prosecution of BEBE's application; i.e., they have had no decision-making role, no supervisory role, and no authorizing role. The non-voting stockholders have never signed any official BEBE documents except those Mrs. Facundus asked them to sign.

50. *Baker Communications Partnership*. Albert Carson (50%) was the first Baker partner to become aware that the Baker channel was available. Baker City Council's secretary, a Jean Byers, so informed him. Then at a Baker Rotary Club meeting he announced that the channel was available. Charles Hall (5%), a Baker Rotary Club member, attended that meeting. He and Carson discussed the channel's availability.

51. Carson wanted Charles Hall to be a participant with him in the Baker venture. So within a few days after the rotary meeting he went to Hall's house to discuss the matter further. Charles Hall was retired and had been retired for 13 years. When he found out he was going to have to work if he became a part of the venture, Charles Hall did not want to get involved. He testified (Tr. 607):

> "When we found out that if we were to apply for this, we would have to work at it. I just didn't want to get myself involved."

52. It was at that point that Lucille Hall (45%), Charles Hall's wife (who had also been retired for 13 years) expressed an interest in being involved. So, initially, Carson and the Halls discussed a 50%-50% partnership between Mrs. Hall and Carson. But then the group changed plans. They agreed to give Mrs. Hall 45% and Mr. Hall 5%. Mr. Hall decided that if his wife was involved he wouldn't want "to sit back entirely."

53. It is Albert Carson that has made almost all the contacts with Baker's counsel since their application was filed. He has made over thirty such contacts, while Mrs. Hall has made only one. When he was examined about the subject at the hearing, Carson at first refused to admit that he was almost exclusively in contact with counsel. In fact, he testified untruthfully about what he had said at his deposition in this proceeding. Essentially he claims he was badgered into stating that he made all the contacts with Baker's counsel. It developed that he wasn't badgered at all.

Diversification of Mass Media

54. *AB*. Neither AB nor any of its partners hold interests in any media of mass communication. AB limited partner Michael Barnes is a limited partner in Delta Broadcasting of Louisiana, Ltd., an applicant for a new commercial FM station in New Orleans, Louisiana. He holds a 33 1/3 ownership in Delta. *See* Finding 22 *supra*.

55. Barnes is also the non-voting stockholder in Two Rivers Broadcasting, Inc., an applicant for a new commercial FM station in Pueblo, Colorado. *See* Finding 24 *supra*.

56. *BEBE-F*. Neither BEBE not Bebe Facundus has any ownership in any other medium of mass communications. On December 15, 1988, BEBE non-voting stockholder *Grey Hammett* was a 33 1/3% General Partner in and Treasurer of Southern Star Network, Inc., a Louisiana corporation. Southern Star owned and operated cable systems in Tangipahoa, Louisiana, and Osyka, Mississippi.

They sold those assets in approximately January of 1989 and hasn't acquired any further communications property.

57. Since April 11, 1989, Grey Hammett has owned a 22.5% voting interest in and been President of Gulf South Cable, Inc. since March, 1990, has owned and operated a cable system in Livingston Parish, Louisiana and has owned a cable system in Beauregard Parish, Louisiana. The Beauregard Parish system is not operational.

58. Since March 31, 1989, Grey Hammett has owned a 30% voting interest in and been has president of U.S. Systems, Inc. U.S. Systems owns a cable system in Cypremont Point, Louisiana. That system should become operable before February, 1992.

59. Former BEBE non-voting stockholder, John F. White (see Findings 38 and 40 *supra*.), is the sole proprietor permittee of a Class A commercial broadcast station in Wiggins, Mississippi. He has petitioned to change the facility's community of license from Wiggins to d'Iberville, Mississippi and to upgrade those facilities to Class C3.

60. *Baker*. Since 1986, Albert G. Carson has owned and operated T.R.E.B. Productions, a video production house. T.R.E.B. produces video programs and commercials for television and cable, and training tapes for in-house use. T.R.E.B. has, in fact, placed commercials on radio and television stations. They intend to produce computer animation for their clients. If the Baker FM application is granted, T.R.E.B. will discontinue representing advertisers to *local* radio television stations.

Best Practicable Service

Comparative Coverage

61. The following chart lists the total areas and populations within the applicants' 1 mV/m contour.

CHART

Applicant	Area (sq. Km)	Population
AB	1,840	287,700
BEBE	1,840	330,400
Baker	1,840	355,400

62. At least five other FM stations cover some part of the area. Thus, the area is well served.

Integration

63. *AB*. AB claims 100% *quantitative integration*. It proposes to integrate its sole General Partner and 30% owner Charles Alexander into the proposed station's day-to-day operation. Alexander proposes to serve full-time (a minimum of 40 hours a week) as General Manager. In that capacity he'll supervise all phases of the station's operation. That will include supervision of all station employees' performance in their assigned duties. He will oversee the ascertainment of community needs and interests, the formulation of station policy, and the fulfillment of Commission rules and regulations. He will terminate his existing employment to fulfill his integration commitment.

64. Charles Alexander *resides* at 4912 Front Royal, Baton Rouge, Louisiana, *outside the proposed station's service area*. From 1975-1979 he attended Louisiana State University, and resided at Broussard Hall on LSU's Baton Rouge campus. That is within the proposed stations 1 mV/m contour. Alexander *proposes to relocate* to Baker if AB's application is granted.

65. Alexander is presently employed as an athletic academic advisor at LSU. As previously noted (Finding 10 *supra*.) he played professional football in the NFL from 1979 to 1986. He will terminate his present employment if AB's application is granted.

66. Alexander has *no past broadcast experience*. But he does claim credit for two *civic activities* within AB's proposed primary service. From 1984-1991, he has worked as a voluntary fund-raiser for Sickle Cell Anemia. From 1982-1991 he has also been a voluntary fund-raiser for the American Cancer Society.

67. Charles Alexander claims the minority enhancements due a Black non-Hispanic male.

68. *BEBE-F*. BEBE claims 100% *quantitative integration*. They propose to integrate their sale voting stockholder, and 47.06% equity holder, Beatrice (Bebe) Facundus into their proposed day-to-day operation. Ms. Facundus will work full-time (forty hours or more per week) as BEBE's General Manager. In that capacity she will supervise and set policy for all areas of station operations. That includes financial management and planning, personnel, programming and sales.

69. Beatrice Botero Facundus was born in Bogata, Columbia on February 25, 1942. She is a naturalized U.S. citizen. She has *resided* in Baton Rouge, Louisiana; i.e., within BEBE's proposed 1 mV/m contour from 1962 to February 1971, and again from about December 1972 to date. Since November 1976 to the present she has lived at 2714 McConnell Drive in Baton Rouge. She plans to continue residing at her present address if BEBE's application is granted.

70. Mrs. Facundus is currently a 50% shareholder, officer, and director in Botero and Associates, Inc., an interior decorating company. Her husband, a full-time Urologist, owns the remaining 50% and is also an officer director. If BEBE is granted she will divest herself of all ownership in Botero and Associates, Inc.; she will resign as an officer and director; and she will cease working for the company. She plans to either sell the company or close it (BEBE Ex. 2, p.1; Tr. 449-451).

71. Although she cannot claim any *broadcast experience*, Bebe Facundus has a wealth of *civic activities* that she has performed within the proposed stations 1 mV/m contour. The following list briefly describes the civic activity, when she served that activity, and the amount of time she gives or gave to that activity:

(1) A member of *Southern University College of Business Advisory Council* from May 1988 to date. She has performed organizational and policy and developed educational programs for business school;

(2) Founder and member, *Unlimited Resources*, 1986 to the present. It is an informal educational association of thirty professional women, devoted to educating themselves, and enhancing their commercial skills;

(3) Founder and Broad Member, *Friends of the Centroplex Theater for the Performing Arts*, 1981 to date she was President 1981-1987, and a member of the Scholarship Committee since 1987;

(4) *Baton Rouge Opera*, 1981 to date. She is a founder of this organization and served as a board member from 1981-1987. Since then she has served on the Fund-Raising and Ticket Sales Committee;

(5) Auxiliary Member, *Louisiana Arts and Science Center (LASC)*, 1973 to date. She has been a fund raiser and a ticket seller;

(6) *Baton Rouge Symphony League*, 1966 to present. She was President of the League from 1974 to 1975. She has been a fund raiser and served a Decoration Chairman for the Symphony Ball;

(7) Member, *American Cancer Society*, 1973 to 1991. She has been a financial patron of the Annual Cancer Ball. In 1973 she was Co-Chairman of the Cancer Ball fund-raising project;

(8) Member, *Community Fund For The Arts Campaign*, 1988. She engaged in fund-raising activities;

(9) *Capital Area United Way, 1988*. As a committee member she solicited and secured contributions;

(10) *Baton Rouge Little Theater*; 1984 to present. She served as a Board Member from 1984-1987. She is still a member and assists with ticket sales;

(11) *Grater Baton Rouge Chamber of Commerce*, 1980 and 1986; and

(12) *Founder and Board Member*, Baton Rouge Choral Society, 1978 to 1985. She planned, prepared, and organized fund-raising projects.

In addition to the above activities she has performed civic service for Our Lady of Mercy Church (1983); the East Baton Rouge Parish Medical Auxiliary (1981-1982); The Community Concern Association (1963-1982); the American Association of Beauty and Barber Salon Owners (1980-1982); St. Aloysius Altar Society (1981); the Trinity Episcopol Church Women (1978); and the Old State Capitol Gallery (1977) etc. Ms. Facundus has also been continuously involved during her 27 years in the Baton Rouge area in various Republican and Democratic political activities.

72. Beatriz Facundus claims those qualitative comparative enhancements due a White, Hispanic, female.

73. *Baker Communications Partnership*. Baker Communications claims 95% full-time and 5% part-time integration. They propose to integrate 50% general partner Albert Carson, and 45% general partner Lucille Hall full-time in the station's proposed day-to-day operations. They also propose to integrate 5% general partner Charles Hall on a part-time basis, 25 hours a week.

74. First, Baker Communications claims they will integrate 50% general partner, Albert Carson into the station's day-to-day operation. Carson will ostensibly spend a minimum of forty hours a week as Program Director and Sales Manager. As Program Director, he will develop and carry out the stations programming philosophy. He will plan and schedule the station programming and supervise and coordinate the on-the-air staff. As Sales Manager, he will supervise, hire and fire sales personnel, develop sales strategies and goals, and develop relations with sales rep. firms. Carson will also implement the station's model EEO program.

75. However, Baker Communication's opponents have shown that Carson's *full-time* integration pledge is highly suspect. As previously noted (Finding 60 *supra*.), Carson has created and owns Television, Radio, and Entertainment Broadcasting (T.R.E.B.), a video production business located in Baker. Since T.R.E.B. is his creation he doesn't intend to give it up (Tr. 633). The company produces video programs and commercials for television and cable, and training tapes for in-house use. It is currently in the process of changing over to animated production. Each year after he formed the business, until his equipment was stolen in a robbery, his business continued to improve.

76. Although Carson claims that if Baker Communications is granted, he will turn over T.R.E.B.'s day-to-day operations to his present full-time assistant, and will cut back his work load so that it doesn't exceed 10 hours per week. That claim is not convincing. He has not defined any discrete block of time which he will work for T.R.E.B. Nor has he indicated that he is willing to avoid T.R.E.B. business while at the station. In fact, the converse is true. He will continue to review T.R.E.B's finished work products; he will continue to meet with any T.R.E.B. clients that come by the station; he will continue to be the primary contact with T.R.E.B.'s attorney; and he will accept T.R.E.B.'s telephone messages during the day.

77. Except for three years when he attended Louisiana Tech University, Albert Carson has *resided* in Baker, Louisiana. He has *broadcast experience* dating back to 1980 when he did production work for KNOE-TV, Monroe, Louisiana in conjunction with the University Sports Department.

78. From 1983-1986 he worked for Group W. Cable in Baker. He was Sales and Local Origination Manager and supervised nine employees. He also implemented their EEO program. And of course his work at T.R.E.B. involves video and audio production.

79. Albert Carson has been *civically active* in organizations located within the 1 mV/m contour of the proposed station. The following list briefly describes those activities:

(1) *Baker Little Theater* from 1983 to the present, he's been a Board Member from 1985 to the present. He was President in 1987 and 1988. He has acted in plays, helped with fund-raising activities, and assisted in theater upkeep;

(2) *Citizens For Memory Park* from 1985 to present. He has assisted in fund-raising activities, and maintained a photo and video history of the park;

(3) *Baker Civic Club* from 1970 to present. He assists in fund-raising activities, and building maintenance. From 1966 to the present he has assisted in the annual carnival ball;

(4) *Baker Police Cadets* from 1984 to 1989. He was a Scout Leader in charge of instructing a youth group about police work;

(5) *Baker Policy Reserves* from 1984 to present. Volunteer patrol and other duties of a policy officer. On call 24-hours a day for photography and videography of police crime scenes;

(6) *Baker Chamber of Commerce* from 1983 to present. Produces television shows for the Chamber. Board member 1988 and 1989. Committee Member 1989 to present. Festival Assistant Chairman in 1986 and Chairman 1987;

(7) *Baker Rotary Club* from 1987 to present. Member. Active in all Rotary functions such as Christmas Baskets;

(8) *Baker Jaycees* 1984 and 1985. He was a member;

(9) *Baker Optimist Club* 1988 and 1989. Carson was a charter member;

(10) *Town and Country Boys Club* from 1985 to 1986. Carson was a charter member of an organization designed to offer activities to children to keep them off the street.

80. A White, non-Hispanic male, Albert Carson cannot lay claim to any qualitative comparative enhancements.

81. Next, Baker Communications claims they will integrate 45% general partner, Lucille Hall full-time into the proposed stations day-to-day operations. Mrs. Hall will purportedly work a minimum of forty hours a week as the station's Business Manager and Director of Public Affairs and Public Service Programming. As Business Manager she will supervise the station's account collections and bookkeeping personnel; and she will monitor the accounts payable and receivable and the station's payroll and banking transactions. As Director of Public Affairs and Public Service Programming, she will ascertain local needs and problems and will coordinate and plan public service announcements and programs responsive to issues of concern in the station's service area.

82. Mrs. Hall hasn't proposed to be involved in a policy-making function. She has identified no such function for herself in her direct case exhibit or in her testimony at hearing (Tr. 578). In fact, she fully anticipates that she would also do clerical work at the station (Tr. 592).

83. Lucille Hall is a long-term resident of Baker. She has lived there since 1959, and at her present address at 2415 Tamarak Street in Baker since 1967. She proposes to continue residing in Baker if the Baker application is granted.

84. Mrs. Hall's fidelity to her *full-time integration pledge* is highly suspect. Her opponent's have so demonstrated. In the first place she hasn't worked for the last 13 years - since 1978. 13 years ago she and her husband Charles owned a business in Baker, the House of Television. They sold that business and retired. So since 1978 Mrs. Hall has been a housewife (Tr. 581, 583, 597).

85. In their retirement she and her husband vacation frequently. They go fishing outside Baker about three days of each week (Tr. 587); they've vacationed in Florida on several occasions, typically staying 10 days at a time; and in February of 1991, they went to Colorado and stayed 10 days.

86. Mrs. Hall has no *past broadcast experience*. She has never performed any kind of broadcast work. Nor has she ever visited a broadcast station.

87. Even when she was working thirteen years ago, her duties at the House of Television were clerical. She spent between six and seven hours a day typing, answering the phone, taking notes, and filling out forms (Tr. 584-587).

88. Lucille Hall has *civic activities* that she has performed within the proposed station's 1 mV/m contour. From 1976 to the present she has been a Paul Harris Fellow for the Baker Rotary Club. She has been active in all their functions including Christmas Baskets, Christmas Parades and Toys For Tots. From 1960-1968 she assisted with the Baker Civic Club's annual ball. She has been a member of Baker Chamber of Commerce from 1976 to the present. From 1981-1990 she helped with the fundraising activities of the Baker Century Club. And from 1958 to the present, she assisted with getting the Heritage Museum started and operating.

89. Mrs. Hall seeks those qualitative comparative enhancements due a White, non-Hispanic female.

90. Finally, Baker Communications intends to integrate 5% general partner Charles Hall on a part-time basis. Mr. Hall intends to devote a minimum of 25 hours a week to being the station's general manager. As General Manager, he will establish and implement the station's overall plans and goals relating to sales, programming, and personnel, and will coordinate with the other management level personnel.

91. Baker Communications' opponents have conclusively demonstrated that Mr. Hall's part-time integration is a sham. Mr. Hall has been retired for the last 13 years - since 1978. 13 years ago he and his wife owned a business in Baker, the House of Television. They sold that business and retired. However, Mr. Hall does have real estate investments which he works on at his home an average of 6 to 12 hours per week.

92. Since retiring Mr. Hall vacations frequently. He has engaged in a variety of recreational and leisure activities with his wife over the past 13 years. He goes fishing three to four times per week outside Baker. His typical pattern each year in the past has been to go fishing three to four times a week and then go on vacations in different locations outside of Baker.

93. In March 1991 (but see Finding 85 *supra.*) he traveled to Colorado for vacation and stayed there for ten days. He recently spent between a week and ten days vacationing in Mexico. He has taken vacations to locations on the east coast of the United States including New York; he has vacationed in Chicago, Niagara Falls, and California; and he has stayed at those location for periods ranging from a few days to as long as a month (Tr. 603). He has vacationed to the Grand Canyon and takes regular vacation trips to Acapulco and Talladago.

94. If Baker Communications acquires the construction permit Mr. Hall will continue to go fishing with his wife. And he admits that his fascination for travel will not end; he doesn't "think it ever ends with anybody." Mr. Hall doesn't expect that he and his wife's life of leisure will stop if Baker Communications acquires the construction permit.

95. Hall brings the same nonchalance to his promise to work 25 hours a week as station manager. He says he wanted the general manager position because he "wanted to do the least work." (Tr. 604). As previously noted (Finding 51-52 *supra.*), at first Charles Hall didn't even want to get involved at all. He said:

> "When we found out that if we were to apply for this, we would have to work at it. I just didn't want to get myself involved."

96. Mr. Hall says he has a friend who works as a general manager and he "likes [the friend's] hours very much." He describes his friend's work schedule this way (Tr. 604-605):

> "He comes in, and sometimes he is in early in the morning, but he leaves early in the middle of the morning. He goes home, has lunch, and has a nap, then he comes in at 2:30 or so, and he stays until sometime in the evening.
>
> "If he wants to take off and go somewhere for the day, he has the people under him arrange it so that he can leave. Like I said, he took two days off, and we went to the races. This man has 30 to 40 people working under him, and they run a very efficient place there."

97. Mr. Hall plans to emulate this kind of work schedule when he becomes general manager. He doesn't believe it necessary to work at the station the 25 hours a week that he has proposed in this direct case (Tr. 613-615). Instead, Hall admires those general managers who spend a maximum of time socializing rather than working at the station (Tr. 613-616).[9]

98. Charles Hall has *resided* in the proposed station's service area since 1940. He lived in Baton Rouge from 1940 to 1959. In 1959 he moved to Baker. From 1967 to the present Hall lived at his present address in Baker.

99. Mr. Hall has some vintage *broadcast experience*. From 1960-1965 he was an independent contractor for WLCS(AM), Baton Rouge, Louisiana. He did tower maintenance and antenna installation work. However, he has never worked inside a radio station.

100. Charles Hall has been *civically active* in organizations located within the proposed station's 1 mV/m contour. From 1976 to the present he has been a member of the Baker Rotary Club. He was a Blue Stone Paul Harris Fellow and Rotary President from 1980-1981. He has been active in all Rotary functions (Christmas Baskets, Christmas Parades, Toys for Tots), and has served as Chairman for several Rotary committees.

101. Mr. Hall narrated for the Baker Civic Club Ball between 1960 and 1968. He has been a member of the Baker Chamber of Commerce from 1976 to the present. He was President of the Chamber in 1986.

102. Hall was a volunteer fireman for the Baker Volunteer Fire Department from 1958 to 1970, and a fundraiser for the Baker Century Club from 1981 to 1990. From 1958 to the present he has assisted with getting the Heritage Museum started and operating.

103. A White, non-Hispanic male Charles Hall cannot lay claim to any qualitative comparative enhancements.

Auxiliary Power

104. All three applicants propose to use auxiliary power.

CONCLUSIONS OF LAW

Issue 1: The Standard Comparative Issue

1. Three applicants seek authority to operate a new FM station on Channel 297A (107.3 MHz) in Baker, Louisiana: (1) AB Partners Ltd. (AB); (2) BEBE-F Broadcasting Corp. (BEBE); and (3) Baker Communications Partnership (Baker Communications). We have held our hearings and have taken our evidence. Now we will analyze the three under the criteria set out in the Commissions *1965 Policy Statement On Comparative Broadcast Hearings*, 1 FCC 2d 393, as modified by subsequent Review Board and Commission decisions.

2. Pursuant to the *Policy Statement* we will address the Commission's two primary objectives: (1) selecting the applicant that will offer the greatest diffusion of control of mass communications media; and (2) selecting the applicant that will offer the best practicable service to the public.

3. *Diversification of Mass Media*. Neither *AB*, nor any of its partners, general and limited, have any cognizable control or ownership over any construction permits or licenses at this point in time. It's true that AB's prime mover, limited partner Michael Barnes has an ownership interest in two other FM applications, one in the state of license, Louisiana (New Orleans). But these are non-attributable interests. *See* Findings 22 and 24 *supra*. So AB is clear from a diversification standpoint.

4. *BEBE* is also clear from a diversification standpoint. The media interests of non-voting stockholders are not attributable unless it is shown that those non-voting stockholders have not been properly insulated from the formation and prosecution of the application. No such showing has been made against BEBE. In fact the opposite is true. BEBE's ownership structure appears *bona fide*. *See* Findings 38-49 *supra*. So the cable interests of non-voting stockholder, Grey Hammett and the FM permit that former non-voting stockholder John F. White holds, are not cognizable. So BEBE suffers no diversification demerit.

5. *Baker Communications* 50% general partner, Albert Carson, owns 100% of T.R.E.B. Productions. T.R.E.B. produces video programs and commercials for television and cable. So there is no dispute that T.R.E.B. is a media producing information for the masses. T.R.E.B., located in the community of license, Baker, supplies programming to television and radio stations in Louisiana. Since Carson owns 100% of T.R.E.B. and 50% of the Baker FM proposal, T.R.E.B. will be considered a medium of mass communications for diversification purposes. So, if Baker Communications were granted, there would be two media of mass communications located in and operating out of the same community. Thus, Baker Communications will be assessed a demerit (of average intensity) under the Commission's first primary objective. So although the demerit isn't decisionally significant, Baker Communications does comparatively trail the other two.

6. Based on the foregoing (Conclusions 3-5 *supra*.) AB and BEBE are equal under the diversification criteria. But each is entitled to a comparative advantage over Baker Communications.

7. *The Best Practicable Service*. We turn then to the Commission's second primary objective. In deciding which applicant will offer the best practicable service, we may have to consider all four basic criterion: (1) we will

decide whether any applicant should be preferred because of a superior areas and populations proposal (comparative) coverage; (2) the extent each will integrate their ownership into the day-to-day management of the proposed station (quantitative integration); (3) the attributes that each integrated owner will being to that day-to-day management (qualitative integration); and (4) whether the degree of quantitative and qualitative is enhanced by minority and/or female ownership.

8. If it becomes necessary to reach the third criterion, qualitative integration, we will look at such factors as local residence, participation in civic affairs, past education, and business experience, past broadcast experience, and auxiliary power.

9. *Criterion-1*: *Comparative Coverage*. Even where, as here, areas are well served (see Finding 62 *supra.*) the Commission awards slight coverage preferences to applicants proposing substantially greater overall coverage. For less significant differences, very slight preferences may be appropriate.

10. Here (see Finding 61 *supra.*), Baker Communications would serve 24% more people than AB and 8% more than BEBE. So they are are entitled to a slight comparative preference over AB, and a very slight comparative preference over BEBE. BEBE, in turn, is slightly preferred over AB for its 16% population advantage.

11. *Criterion-2*: *Quantitative Integration*. Two of the three applicants claim 100% quantitative integration. But only one BEBE, has sustained its claim. AB's quantitative claim is a complete sham. The third, Baker Communications claims 95% full-time and 5% part-time integration. But Baker Communication's claim is at least 50% sham, if not 100%.

12. *BEBE*. No substantial evidence exists on which to question the *bona fides* of BEBE's ownership structure. Indeed, the record evidence points to the contrary. *See* Findings 38-49 and 68 *supra*. Bebe Facundus, Bebe's sole voting stockholder, 47% equity holder, and proposed full-time General Manager has been and remains the moving force behind BEBE's application. She organized the applicant doing "99% of the talking." She has made it clear from the outset that she wouldn't be part of the project unless she controlled it. She has exercised exclusive control.

13. She selected the applicant's corporate form of organization, its attornies, and its engineer. She has arranged the applicant's finances, and negotiated the applicant's transmitter site agreement. Mrs. Facundus has paid her *pro rata* share of expenses and initiated all capital calls for the applicant.

14. She ordered her local counsel to have the corporation purchase Melvin Lee Holden's 15 shares of non-voting stock when he defaulted on a capital call; she purchased John F. White's 15 shares of non-voting stock when he decided not to continue as an investor; and she has let all the other non-voting stockholders know that if at any time they did not meet their capital calls she would be there to buy them out.

15. None of BEBE's non-voting stockholders have been involved in the prosecution of BEBE's application. They have had no decision-making role in preparing and prosecuting the application, in supervising local or FCC counsel's performance, or in authorizing payments to local or FCC counsel. They have never signed any corporate official documents, except those that Mrs. Facundus has asked them to sign.

16. Based on the foregoing (Conclusions 12-15 *supra.*), BEBE has sustained its claim to, and will be awarded 100% quantitative integration.

17. *AB*. Although they claim 100% quantitative integration, AB will be awarded none at all. AB is one of the Michael Barnes/Michael Miller series of FM applications filed between May 7, 1986 and December 15, 1988. *See* Findings 19-25 *supra*. AB's sole general partner, Charles Alexander (on whom AB bases its quantitative claim) played virtually no role in either the preparation or the prosecution of AB's application. To the contrary, its been Michael Barnes, ostensibly a 35% passive limited partner, who exercises *de facto* control and influence over AB. Barnes is the force that drives this application.

18. Barnes and Michael Miller, AB's counsel and Barnes' long time personal friend and attorney, on several different occasions have structured FCC applications in which Barnes purports to take a passive role. The Baker filing is one of them. Here Barnes organized the application. He contacted a long time friend, Henry Harris and talked him into becoming a limited partner.[10]

19. It was Barnes who subsequently located a "competitive" minority individual to serve as general partner, Charles Alexander. Barnes retained Miller's services as counsel, and Barnes and Harris have paid for virtually all expenses accrued during the application and prosecution period. To this day any engineering bills are sent to Michael Miller, and Barnes wires Miller the money to pay them. Barnes also wires the money to Miller to pay legal expenses such as the application filing fee. Harris paid the hearing fee.

20. Alexander played no role in selecting AB's limited partners, nor in apportioning the equity. Indeed, by the time Alexander was recruited Barnes and Harris had already decided that they would hold 70% of AB's equity. Barnes *told* Alexander that his equity interest would be the remaining 30%. It was Barnes who drafted the limited partnership agreement.

21. It was Michael Miller, not Charles Alexander, who located and contacted AB's consulting engineer, located the transmitter site, and drafted AB's application and application exhibits.

22. Charles Alexander has had no genuine financial stake in the application since it was organized. Under AB's limited partnership agreement, Alexander is not obligated to pay partnership liabilities. If he advances any funds they are considered loans repayable to him rather than capital contributions.

23. Based on the foregoing (Conclusions 17-22 *supra.*), it is concluded that AB has failed to justify their claim for 100% quantitative integration. Limited Parter Michael Barnes has exercised significant power over the business and affairs of AB and cannot be considered a passive investor. Conversely General Partner Charles Alexander's almost total non-involvement in the preparation and prosecution of AB's application renders AB's ownership structure of a patent sham. AB will therefore be awarded 0% quantitative integration.

24. *Baker Communications*. Baker Communications claims 95% full-time and 5% part-time quantitative integration. They have failed to sustain that claim. They have not established a reasonable likelihood that their integration proposal will be fully effectuated.

25. First, Charles Hall's 5% part-time claim hasn't been sustained. He will receive no quantitative credit for proposing to work 25 hours a week as Baker Communication's General Manager.

26. Charles Hall has been in retirement for the past 13 years. He and his wife take fishing trips three or four days each week. When not fishing they take anywhere from several days to a month vacationing around the country. He goes to New York, Chicago, Niagara Falls, California, Grand Canyon, Acapulco, and Talladago.

27. He doesn't intend to come out of retirement. He is not willing to give up his life of leisure. Moreover, during his 13 years of retirement, Hall has developed a strong aversion to work. He chose the position as AB's general manager because "[he] wanted to do the least work." He proposes to merely don the general manager's hat, assume none of the position's duties, and continue the kind of socializing outside the office that characterizes his retirement. Charles Hall cannot be counted on to even fulfill his 25 hours per week commitment. Baker Communications' claim for 5% part-time quantitative integration for Charles Hall is denied.

28. Similarly Lucille Hall has failed to sustain her 45% full-time claim to being the proposed station's business manager and director of Public Affairs and Public Service Programming. Like her husband, Mrs. Hall has been retired for the last 13 years and has spent that time vacationing. Her husband doesn't expect that he and his wife's leisure will stop if Baker Communications acquires the construction permit (see Finding 94 *supra*.). In brief, Lucille Hall hasn't convincingly shown that she can and will abandon a life of self-directed leisure to work full-time at the proposed station.

29. Equally important, Mrs. Hall doesn't propose to occupy a policy position at the proposed station. Neither in her direct case exhibit nor in her testimony has she delineated any policy-making function for herself at the station. Instead of the record supports the idea that Mrs. Hall will be doing clerical work just as she was doing thirteen years ago (see Finding 87 *supra*.). Indeed she fully anticipates that she will also do clerical work at the station (see Finding 82 *supra*.). Clerical work doesn't warrant the award of any quantitative integration credit.

30. Based on the foregoing (Conclusions 28 and/or 29), Lucille Hall's claim for 45% full-time quantitative integration credit is denied.

31. Finally, Baker Communications seeks 50% quantitative integration for 50% General Partner, Albert Carson. Carson will purportedly spend a minimum of forty hours a week as Program Director and Sales Manager. Whether to honor this 50% quantitative claim is a much closer case than Charles and Lucille Hall's claim.[11]

32. Back in the 1983-1986 time frame when Carson worked for Group W, he decided that if he was ever going to get ahead he was going to have to go into business for himself. So he decided to start a career of his own. Thus he founded and owns a video production house: Television, Radio and Entertainment Broadcasting (TREB). Each year after he formed TREB it continued to improve, until his equipment was stolen in a robbery. TREB is presently converting to computer animation. Carson has one full-time assistant in the business. As one might expect, if Baker Communications is granted a CP, Carson doesn't propose to divest TREB productions - this budding career.

33. Carson asserts that he would limit his involvement in TREB affairs to 10 hours per week. Even *assuming* the sincerity of this assertion it cannot be credited. Carson admits that he will, in fact, conduct TREB business while at the station: he will review TREB work products; discuss TREB business with counsel; meet with TREB clients; and accept TREB telephone calls at the station during business hours. As noted above (Conclusions 32 *supra*.), Carson has only one other employee at TREB, and has not proposed to hire others to perform his work while he is engaged in radio station business. Moreover, he hasn't delineated any discrete block of time that he will set aside for TREB work.

34. Based on the foregoing (Conclusions 31-33 *supra*.), and since Carson hasn't established how he can meet his hourly full-time commitment to the station in the face of his conflicting obligations to TREB, the conclusion is warranted that Baker Communications can receive no quantitative integration for Albert Carson.

Ultimate Conclusions

35. Summarizing thus far, under the Commission's first primary comparative objective; i.e., diversification of mass media, both AB and BEBE are clear. Neither has any cognizable media of mass communications that can be attributed to them. Moreover, each of two has gained a comparative advantage over Baker Communications. Baker Communications is assigned a diversification demerit because 50% General Partner, Albert Carson owns 100% of T.R.E.B., a video production house located in Baker, the city of license. However, the comparative advantage that AB and BEBE have each obtained over Baker Communications are not, standing alone, decisionally significant.

36. Turning to the second Commission objective, the best practicable service to the public, we find the first criterion, comparative coverage is also without decisional significance (see Findings 61-62 and Conclusions 9-10 *supra*.). Baker Communications is entitled to a slight comparative coverage preference over AB and a very slight coverage preference over BEBE. BEBE, in turn, is slightly preferred over AB for its 16% population advantage.

37. It is the quantitative integration factor that proves decisional. BEBE has sustained its claim for 100% quantitative integration, while both AB and Baker Communications have failed to sustain theirs. AB's organizational structure has been shown to be a classic sham; and none of Baker Communications' three partners have demonstrated that they can meet their full-time integration pledge. So both AB and Baker Communications are awarded 0% quantitative integration.

38. Since BEBE has been awarded 100% quantitative integration and AB and Baker Communication have been awarded 0%, there is no need to analyze the qualitative integration attributes of each of the three.[12] [13] So BEBE is declared the comparative winner. *See New Continental Broadcasting Co.*, 88 FCC 2d 830, 50 RR 2d 1117 (1981); *Van Buren Community Service*, 87 FCC 2d 1018, 50 RR 2d 115 (1981); and *Cannon Point Broadcasting Co.*, 93 FCC

2d 643 (R. Bd. 1983) at 649. It is BEBE that will offer the best practicable service to the public in Baker, Louisiana and vicinity.

SO, unless an appeal is taken from this Initial Decision or the Commission reviews it on their own motion, AB Partners, Ltd's application (BPH-881215MI) and Baker Communications Partnership's application (BPH-881215NN) ARE DENIED; and BEBE-F Broadcasting Corp.'s application (BPH-881215NE) IS GRANTED.[14]

FEDERAL COMMUNICATIONS COMMISSION

Walter C. Miller
Administrative Law Judge

FOOTNOTES

[1] Oasis Radio Affiliates Inc.'s and Kathleen D. Walker's applications were dismissed on February 25, 1991 (FCC 91M-741); Rupert of East Baton Rouge Broadcasting L.P.'s application was dismissed on April 25, 1991 (FCC 91M-1453); and Bear Broadcasting of Louisiana, Inc.'s application was dismissed on June 7, 1991 (FCC 91M-1828).

[2] The issues have been renumbered to conform with the pleading cycle.

[3] Of course, the Bureau only addressed the comparative coverage issue (Finding 3 *supra*.).

[4] Although AB filed their application with the Commission on December 15, 1991, the partnership agreement and registration form were not filed with the Secretary of the State of Louisiana until March 15, 1991; i.e., about a month and a half after this case was designated for hearing. *See* DA 90-1921 released January 28, 1991; and Tr. 194.

[5] Melvin Holden failed to meet a capital call, and Ms. Fecundus elected to have the corporation buy him out. Holden sold his 15 shares of non-voting stock back to the corporation on February 13, 1991. This reduced the number of non-voting shares to 60 and proportionately increased the equity interest of each of the remaining stockholders.

[6] Barnes' involvement in the Orlando, Monroe and Pueblo applications will be discussed *infra*. along with a discussion of his participation in an FM application for New Orleans, Louisiana.

[7] Barnes' version of how AB's ownership structure borders on the incredible. Barnes did AB's cause no good with this testimony.

[8] Mrs. Facundus did about "99% of the talking." (Tr. 407).

[9] At Tr. 616, the Trial Judge asked Mr. Hall the following summary question:

> "That is one of many approaches to an occupation, and you have two friends that you admire that get by with a minimum of time in the office, and the maximum time socializing, and being friendly to people?"

Hall answered: "Right."

[10] Barnes' motives in recruiting his old friend Harris were not entirely altruistic. It is Harris who is responsible for the loan letter. In fact as it is set up, the General Partner, Charles Alexander (30%) must file a formal loan application with Limited Partner Harris (35%) before a final determination of funding can be made. *See* Findings 29-30 *supra*.

[11] Actually the conclusions on Carson's 50% claim could become academic if Charles and Lucille Hall's quantitative claims *supra., are denied.*

[12] Note however that Criterion 3 *Qualitative Integration* findings and Criterion 4 *Minority And/or Female* enchancement findings have also been made. *See* Findings 64-67, 69-72, 77-80, 83-89, 98-103, and 104 *supra*. So if the appellate body disagrees with the quantitative integration analyses, no remand will be needed.

[13] Although Criterion 2, Quantitative Integration has proven dispositive, this doesn't mean that BEBE is weak qualitatively or lacks minority and or female enhancements. In fact, Beatrice Facundus, BEBE's proposed General Manager holds 47% of BEBE's equity, is a long time resident of the service area, has a superb civic activity record, and can claim the enhancements due a White Hispanic female.

[14] If exceptions aren't filed within 30 days, or the Commission doesn't review the case on its own motion, this Initial Decision will become effective 50 days after its public release. *See* 47 CFR 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-407

In re Applications of

RICHARDSON BROADCAST GROUP	File No. BPH-870824MG
ELIZABETH M. YOUNTS	File No. BPH-870824MH
GREENE BROADCASTING, INC.	File No. BPH-870824MI

For Construction Permit for a
New FM Station on Channel 273A
at Southern Pines, North Carolina

MEMORANDUM OPINION AND ORDER

Adopted: February 13, 1992; Released: February 24, 1992

By the Commission:

1. By this action we vacate a Review Board Decision, *Richardson Broadcasting Group*, 5 FCC Rcd 5285 (Rev. Bd. 1990), *recon. denied*, 5 FCC Rcd 6364 (Rev. Bd. 1990) and 5 FCC Rcd 6964 (Rev. Bd. 1990), granting the application of Elizabeth M. Younts for a new FM broadcast station at Southern Pines, North Carolina. We find that Younts was lacking in candor in her hearing testimony and that she is not qualified to be a licensee. The ALJ had previously granted Green Broadcasting, Inc.'s (GBI) application, finding that Younts was lacking in candor and could not be relied on to carry out her integration pledge. He also assessed a decisionally significant comparative demerit against Richardson Broadcast Group (RBG), finding that its engineering proposal would have an adverse environmental effect. *Richardson Broadcast Group*, 4 FCC Rcd 7989 (ALJ 1989). In order to compile the necessary record to weigh the proposals of GBI and RBG, we are remanding this proceeding for further hearings concerning the financial and comparative qualifications of RBG.

2. Now before the Commission are Applications for Review filed September 24, 1990 by GBI and December 26, 1990 by RBG.[1] They argue that Elizabeth M. Younts is lacking in candor and that she has not shown that she will be integrated into the operation of the applicant. GBI also asserts that RBG should be assessed a comparative environmental demerit because it will produce radiofrequency (RF) radiation in excess of that allowed by 47 C.F.R. § 1.1307 (b).[2] RBG and GBI also ask for review of a ruling, *Richardson Broadcasting Group*, 3 FCC Rcd 5453 (MM Bureau 1988), granting an amendment substituting Elizabeth Younts as the applicant for her husband who died before the applications were designated for hearing. In addition, on December 28, 1990, GBI filed a Motion to Reopen the Record and Enlarge the Issues and designate financial and candor issues because of a bankruptcy proceeding pending against RBG.[3] On November 26, 1991, RBG filed a Motion for Leave to Amend and an Amendment pursuant to 47 C.F.R. § 1.65 advising the Commission that a plan for its reorganization pursuant to Chapter 11 of the Bankruptcy Act had been approved by the bankruptcy court.[4]

Younts' Qualifications:

3. The ALJ found that Elizabeth Younts lacked candor in her testimony and "cannot be depended on to carry out her integration pledge." 4 FCC Rcd at 7992 ¶ 40. The Board reversed, finding that her testimony would not adversely reflect upon the viability of her integration proposal. 5 FCC Rcd at 5287 ¶ 11. It is well established, however, that the "fact of concealment may be more significant than the facts concealed" because it shows a willingness to deceive the Commission. *Character Qualifications*, 102 FCC 2d 1179, 1210 n.77 (1986). While many of the matters about which Younts either was evasive or deceptive individually may be of little moment, collectively they demonstrate a pattern of evasiveness and false testimony clearly indicating a willingness to deceive the Commission to gain a perceived advantage. Thus, as set forth below, the record of false testimony and evasion based on the applicant's personal testimony requires the denial of Younts' application. *William M. Rogers*, 92 FCC 2d 187, 199 (1982).

4. *Testimony about local residence*: Younts testified that she has been a resident of Southern Pines continuously since 1947. Younts Exh. 1, p. 2. The ALJ found, to the contrary, that she had moved to Florida in 1984. 4 FCC Rcd at 7994 ¶¶ 49-51, 7998 ¶ 13. The Board found that Younts never abandoned her North Carolina home and that she merely shuttled back and forth while looking for a home in Florida. 5 FCC Rcd at 5286 ¶ 8. The record shows that in 1984 Younts got a Florida driver's license; that she subsequently changed her voting address to Florida; and that she voted in Florida in 1988. Tr. 354, 356-56; 4 FCC Rcd at 7994 ¶ 49. Younts testified that she and her husband did not pay North Carolina taxes from 1984-89 because they "were residents of Florida." Tr. 361. Finally, Younts acknowledged that her testimony that she has continuously been a resident of Southern Pines since 1947 was not accurate. Tr. 362. Thus, Younts, in an attempt to strengthen her showing of local residence, falsely testified that she had resided in Southern Pines continuously since 1947.

5. The record also shows that Younts tried to avoid an admission that she changed her voter registration back to North Carolina the day before her deposition in this proceeding. Younts testified during the hearing that:

> I changed my voter registration back to North Carolina the first week of January, not the day before the deposition.

Tr. 362. Counsel then produced documents showing that she changed her voting registration on January 3, 1989, and that her deposition was taken on January 4, 1989. Tr. 366. Thus, while Younts correctly indicated that she changed her registration during the first week in January, she inaccurately denied that it was also the day before her deposition was taken.

6. *Testimony about involvement of Younts' children*: The ALJ found that Younts' testimony concerning the involvement of her children in her proposed station was evasive and less than candid. 4 FCC Rcd at 7994-95 ¶¶ 52-53. Her children are involved in the communications industry. Her son, Mitts Younts, is a media broker. Younts tried to avoid answering questions about whether she had discussed her application with her son. She testified as follows:

> Q. The question is have you conferred with your son, Mitts Younts, regarding the prosecution of your application?
>
> A. No, my son is an advisor to me and he is only in an advisory capacity.
>
> Q. . . . My question is have you talked to him about this?
>
> A. I talk to him a lot on the phone and in person.
>
> Q. That's fine. And now the question I have for you is do you ever talk to him about the application, the FM station?
>
> A. He knows about it.
>
> Q. Have you ever talked to him about the FM station?
>
> A. He knows about the fact that I filed an application.
>
> **Judge Miller: Have you ever talked to him about the application?**
>
> A. Some. Yes, I have talked to him, yes.

Tr. 381-82. Thus, Younts was asked five times whether she had discussed the application with her son before she admitted having talked to him about it. Thereafter, Younts was asked whether her son had provided advice about this proceeding.

> Q. All right. Has he advised you in connection with your prosecution of the application?
>
> A. Only in an advisory capacity.
>
> Q. . . . but what I am asking you is if he advised you?
>
> A. About what?
>
> * * * *
>
> Q. Has he taken part in discussions . . .?
>
> A. Only in an advisory capacity.
>
> Q. What do you mean by only in an advisory capacity?
>
> A. He did not advise me what to do about the FM application. He advised me on many other matters. And when Gary Smithwick came down for the deposition, he . . . was in the room.
>
> * * * *
>
> **Judge Miller: He said something to you, didn't he?**
>
> A. He said a few things to me but - -
>
> **Judge Miller: About the application?**
>
> Q. I don't remember.

Tr. 382, 402-03. This testimony displayed an evasiveness concerning her son's role in the prosecution of the application and a willingness to withhold information from the Commission potentially relevant to her showing concerning the overall reliability of her integration proposal.

7. *Testimony about knowledge of Younts' husband's integration intent*: Younts initially testified that she had no knowledge of her late husband's intent to seek integration credit but then changed her testimony as follows:

> Q: Mrs. Younts, after your husband filed the application with the FCC for the construction permit [in 1987], do you know, was he planning to be the General Manager of the proposed station and operate the station by living in Southern Pines, or was he planning to retire to Florida?
>
> A: I can't speak for him. I'm sure he was going to be a resident of North Carolina, but I cannot speak for him.
>
> **Judge Miller: Well did he change his driver's license [in 1984] when you did?**
>
> A: I don't recall.
>
> **Judge Miller: Did he change his voting registration [to Florida] when you did?**
>
> A: Yes.
>
> * * * *
>
> Q: Now, how do you know that your husband would have claimed 100% integration credit?
>
> A: As I said before, I cannot speak for him, but I'm sure that if he were here, he would have -- he would have changed his voter registration and he would have changed his domicile to the Southern Pines area again.
>
> Q: How do you know that?
>
> A: I don't know that. I can't speak for him.

Tr. 369-370. However, on redirect reexamination Mrs. Younts claimed that she had discussed her late husband's intentions with him:

> Q: You were also asked a question regarding whether or not you knew if your husband would have claimed integration credit in this proceeding. Do you know whether your husband planned to work at the radio station?
>
> A: I think he -- I am sure that he planned to work at the radio station.

Q: Did you discuss it with him?

A: Yes.

Tr. 415.

8. Mrs. Younts explained her previous answer by claiming that she was confused by the term integration. Tr. 415. However, the question prompting her original testimony did not use the term integration. Moreover, she used the term integration in her written direct testimony, and her original testimony did not display any confusion about the term. Tr. 370, 435-36. Finally, when she tried to clarify how she knew her husband would manage the station, she again gave contradictory and inconsistent testimony.

Q: What was the basis of your knowledge of your husband's plans?

A: I heard him talking about it and I heard him making plans and talking to people over the telephone, and also he talked with me about it. But he did not give me all the details of it.

Q: Well, did he tell you that he was going to work as the full-time general manager, 40 hours or more per week?

A: Yes.

Q: When did he tell you that?

A: Oh, over a period of a year-and-a-half-before the application was filed.

Q. When did he first tell you that?

A: The summer of 1987.

Q: Do you recall what month in the summer of 1987?

A: About the time that the application was filed, August possibly.

Tr. 437.[5] The Board found this testimony concerning her husband's integration plans to be both legally irrelevant conjecture, and fully consistent as to Younts' belief concerning his involvement with the station. 5 FCC Rcd 5287 ¶ 10. We agree with the Board that Mr. Younts' intent is immaterial because he died before the applicable cut-off date for integration proposals in this case. But review of Mrs. Younts' testimony on this subject shows that, for whatever reason, Younts was unable or unwilling to provide congruent answers to repeated efforts to obtain the same information, and it is those discrepancies that are most troubling here.[6]

9. The law is well settled that intentional deceit during an FCC hearing can lead to disqualification. *RKO General, Inc.*, 78 FCC 2d 1, 104 (1980) *aff'd RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981). The Commission has long held that false statements are in and of themselves disqualifying, and that specific notice to an applicant that it must testify truthfully is superfluous. *Grenco, Inc.*, 39 FCC 2d 732, 736 (1973). *Old Time Religion Hour, Inc.*, 95 FCC 2d 713, 719 (Rev. Bd. 1983). The ability of the Commission to rely on the representations of applicants and licensees is crucial to the functioning of our regulatory processes. The truthfulness and candor of applicants are always in issue, and the Commission expects applicants to be candid in Commission proceedings. *William M. Rogers*, 92 FCC 2d at 199; *RKO General, Inc.*, 78 FCC 2d 104. Here Younts admitted that she gave false testimony concerning her age and that her claim to have lived continuously in Southern Pines since 1947 was not true. She was also evasive in responding to questions about her son's involvement in prosecuting the application, she contradicted her own testimony concerning her discussions with her late husband about his intention to be integrated into the proposed station, and she tailored her testimony about whether she was retired. This record establishes that, in a number of respects, Younts intentionally gave false testimony and was evasive in her testimony. While the various discrepancies and evasions might not individually be significant, collectively they require the denial of her application.[7]

RBG's Application:

10. *Environmental Impact of RBG's Proposal*: The Bureau designated an environmental impact issue against RBG and required RBG to file an Environmental Assessment (EA) because its proposed operation "may significantly exceed the radiofrequency radiation guidelines under 47 CFR 1.1307(b)." 3 FCC Rcd 5453, 5454 ¶ 6 (1988). RBG filed an EA proposing to build a fence around its antenna, which is to be mounted on the tower of existing station WEEB(AM), and to limit exposure of humans to excessive radiation consistent with the standards of the American National Standards Institute (ANSI). The Bureau determined that the fence would bring RBG's proposal into compliance with the Commission's environmental rules and it recommended that the ALJ delete the environmental impact issue. However, although the ALJ deleted the environmental issue, he then proceeded to consider the environmental impact of RBG's proposal under the standard comparative issue. *Richardson Broadcast Group*, 89M-382 (ALJ Feb. 6, 1989). In particular, he awarded Younts and GBI decisionally significant comparative preferences, finding that RBG's proposed operation would be a hazard to human health and safety. 4 FCC Rcd at 7998 Conc. 8. On review, the Board found that the ALJ lacked authority to consider the environmental matters. 5 FCC Rcd at 5289-90 ¶ 20.[8]

11. Guidelines for applying the environmental rules are set forth in OST Bulletin No. 65, October 1985, *Evaluating Compliance with FCC-Specified Guidelines for Human Exposure to Radiofrequency Radiation*. The Bulletin recommends that licensees protect the public from excessive radiation by "fencing and posting [of] areas where RF fields may exceed the standard." OST Bulletin No. 65 at p. 26. The Bulletin further provides that licensees can protect workers by reducing the average exposure to radiation via spreading work out over longer periods of time or scheduling work when the station is operating at reduced power or shut down. *Id.* at 28.[9]

12. RBG erected a wood fence as proposed, it placed barbed wire on the fence and it marked the fence. RBG also promised to protect its employees from excessive radiation by spreading out work over long periods of time or scheduling work when the station is shut down or operating at reduced power as recommended in Bulletin 65. Although Younts and GBI argue that RBG has not shown how it will comply with the OST recommendations, RBG has promised to adhere to those recommendations, and the other applicants have made no showing that its promise will not be fulfilled.[10] RBG pledged to take appropriate steps to protect its employees and the public from excessive radiation, and the Bureau thus

properly concluded that RBG's EA complied with the Commission's environmental rules based on the record at that time.

13. When the Bureau made its initial "no environmental hazard" determination, RBG was the licensee of WEEB and its ability to reduce the power of WEEB or to go dark if necessary in order to comply with our radiation rules was not in question. However, RBG thereafter assigned the license for station WEEB to a new licensee. Based on that circumstance, Younts and GBI argue that RBG no longer has the ability to make WEEB go dark. RBG, however, has presented a new environmental showing in response to the General Counsel's request for comments.[11] RBG's new environmental showing, which is unrebutted, establishes that its proposed station, by using an antenna that provides substantial reduction of the energy radiated downward, will contribute less than one per cent of the permissible ANSI radiation limit for WEEB's tower. Because RBG has shown that it will produce less than one per cent of the radiation in question, it is exempt from the constraints of the environmental rules and the entire responsibility for providing protection from excessive radiation lies with WEEB. *See* Section 1.1307 n.2.[12] Therefore, there is no need for further consideration of environmental impact matters in this proceeding.

14. *RBG's Bankruptcy*: RBG has previously reported the fact of its Chapter 11 (Debtor in Possession) bankruptcy. Based on that circumstance, Younts and GBI filed timely motions to specify issues against RBG, arguing that the bankruptcy raised reporting, candor and financial qualification issues and that it undermined the viability of RBG's integration proposal.[13] The Review Board did not address the questions raised by RBG's bankruptcy. 5 FCC Rcd at 5293 ¶ 36. GBI now argues that the Commission should specify a Section 1.65 reporting issue, reevaluate RBG's integration proposal, and add the financial and candor issues previously requested. RBG has now advised the Commission that its reorganization pursuant to Chapter 11 of the Bankruptcy Act has been approved by the court. Younts contends, however, that the approval of the reorganization plan does not resolve the questions about RBG's financial qualifications.

15. *RBG's Financial Qualifications*: Where, as here, the record has been closed, a motion to reopen and specify issues must rely on newly discovered evidence, and show that the new evidence, if true, would affect the ultimate disposition of the proceeding. *Omaha TV 15, Inc.*, 4 FCC Rcd 730, ¶ 6 (1988). After filing its Chapter 11 petition, RBG submitted a new commitment letter to cover necessary construction and operating expenses from First Bank which stated that it was aware of the RBG bankruptcy. RBG argues that the bankruptcy reorganization, which has been approved by the court, together with the financing commitment from the First Bank, demonstrate that it is financially qualified.

16. Notwithstanding RBG's assertion that its bankruptcy reorganization proposal has been approved by the court, considerable uncertainties remain about RBG's financial situation. Thus, RBG's bankruptcy is a change in circumstances which occurred after this hearing record was closed, and no showing has been made concerning the Plan approved by the court. In this regard, the court's order reflects that this is the Second Amended Plan submitted by RBG and that RBG is still required to submit quarterly reports reflecting its progress in consummating the Plan. Furthermore, as Younts points out, a hearing has been scheduled on a claim by the North Carolina Department of Revenue, which had earlier petitioned to change RBG's Chapter 11 proceeding to a Chapter 7 bankruptcy,[14] and two local court judgments have been rendered against RBG's general partner (and/or his spouse) on behalf of financial institutions. While it is clear that it is RBG's, and not its general partner's, financial qualifications that are critical here, and while RBG is relying on financing from the First Bank for future construction and operation of this proposed FM station, we agree with Younts and GBI that RBG's bankruptcy raises substantial and material questions of fact which cannot be resolved simply by its reliance on the bankruptcy court's approval of its reorganization Plan and its financing from the First Bank. Until a record is developed concerning the impact of the bankruptcy proceeding on RBG's ability to finance the construction and operation of its proposed station, we will be unable to determine RBG's basic financial qualifications to be a licensee. Thus, we will remand this proceeding for further hearings on the effect of the bankruptcy on RBG's financial qualifications.

17. *RBG's Candor*: During the hearing, Lawrence Richardson, RBG's principal, testified that RBG was solvent and paying its bills as they became due. Tr. 199-203. In its motion to reopen the record, GBI argues that RBG was lacking in candor because it had been delinquent on two loans from the NCNB bank and was in arrears in payments to BMI (a music licensing organization). RBG responds that it was paying bills on time and that the cash flow problems did not surface until after Richardson's hearing testimony. RBG submitted an affidavit from its bankruptcy attorney asserting that, based upon his preparation of RBG's schedule of debts, it appears that RBG was solvent as of the date of Richardson's testimony and that prior to that time RBG was paying its bills on a timely basis. Consolidated Opposition to Motion to Enlarge Issues, filed February 20, 1990 by RBG, Attch. 2. RBG also asserts that the loan default followed an unfortunate accident in which Richardson was completely incapacitated. During that period, RBG's acting manager negotiated a six month extension during which it was only required to pay interest to NCNB. According to RBG, Richardson believed RBG had an indefinite extension, requiring it to pay interest only, and he did not receive a statement that RBG was delinquent until after he testified. In support of its contentions, RBG submitted copies of checks showing that payments had been made to NCNB during January and February 1989. Consolidated Opposition, *supra*, Attch. 1.

18. RBG's assertions that Richardson had been injured and that RBG was authorized by the bank to pay only interest for six months is unrebutted. RBG also submitted evidence in the form of canceled checks to show that payments were made to NCNB in January and February 1989. There is no suggestion that these payments were not made in good faith, and under these circumstances, the subsequent determination by the NCNB bank that RBG was delinquent in its loan payments does not raise a significant question of fact concerning the candor of Richardson's testimony.

19. GBI's request for an issue as it relates to RBG's asserted debt to BMI is procedurally deficient. 47 C.F.R. § 1.229(d) requires a request to enlarge issues to be supported by affidavits or declarations of a person or persons having personal knowledge of the pertinent facts. GBI

submitted a statement from an employee of its counsel affirming that she had been in contact with BMI and was told that RBG was behind in its payments to BMI. In response to the request for issues, RBG showed that it had worked out a payment schedule with BMI. That schedule is consistent with Richardson's testimony. Moreover, GBI's request is deficient because its declarant does not have personal knowledge of the history of RBG's payments to BMI and GBI did not provide an affidavit from a BMI employee with knowledge of the facts. Thus, GBI has not raised a question warranting a hearing concerning RBG's alleged failure to make timely payments to BMI.

20. Richardson also testified that he previously worked for radio stations WIOZ and WCEL-AM, voluntarily left both stations to accept other employment, and was on good terms with the management of both stations. Tr. 232-34. Richardson denied selling fraudulent advertising contracts while at the stations. He also denied that he left the stations because of problems concerning his sales of advertising. Tr. 239-41. Younts moved to enlarge issues concerning the candor of these representations.[15] GBI urges the Commission to specify the issues requested by Younts. Younts submitted a declaration from William R. Gaston, the former owner of WIOZ, that he was aware of irregularities in Richardson's advertising accounts, and that he believed Richardson resigned from the station to avoid being fired. Younts also submitted copies of the minutes of a meeting of the owners of WCEL in which the station manager reported there had been problems with Richardson as sales manager and that this was the reason he was no longer with the station.

21. We agree with the ALJ that Younts failed to raise a significant question concerning Richardson's candor. Gaston's declaration admits that he did not fire Richardson. Gaston did not claim to have even told Richardson that his employment was in jeopardy. He also failed to list any of the purportedly irregular contracts and does not explain the circumstances concerning any of them. Motion to Enlarge Issues, filed April 20, 1989, by Younts, Attach. E. Thus, there is no showing that Richardson knew he would be fired and the statements of Gaston and Richardson, reflecting the perspective of each individual, are not inconsistent. Moreover, Richardson submitted a declaration from Cranford Garner who had been an advertiser on WIOZ. Garner asserts that there was a dispute concerning his advertising and that he believed WIOZ ran advertising he did not order. He attributed the problem to an honest mistake and asserts that the matter was satisfactorily resolved. Opposition to Motion to Enlarge Issues, filed May 3, 1989 by RBG Exh. 3. Richardson characterized the other irregularities as honest mistakes. It is also undisputed that after leaving WIOZ Richardson took a higher paying job. Thus, Gaston's declaration failed to allege sufficient facts to warrant designation of an issue.

22. Moreover, the minutes of the WCEL annual meeting contain unsworn allegations of unspecified misconduct and those allegations are not supported by declarations or sworn statements as required by 47 C.F.R. § 1.229. The minutes also failed to detail any specific misconduct by Richardson, except to note the fact that one former advertiser was "turned off." Motion to Enlarge Issues, filed April 20, 1989 by Younts, Attach. G. Thus, the minutes are also too vague to support the specification of additional issues. Accordingly, the ALJ properly denied Yount's request to enlarge the issues against RBG, and Younts and GBI have not presented a basis for specifying candor issues against RBG.

23. *RBG's Integration*: The Commission generally does not consider passive ownership interests, such as nonvoting shareholders and limited partners, in assessing integration proposals. *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 488 ¶ 15 (1981); *Attribution of Ownership Interests*, 97 FCC 2d 997 (1984), *recon. granted in part*, 58 RR 2d 604 (1985), *further recon. granted in part*, 1 FCC Rcd 802 (1986). However, where allegedly passive owners engage in post-organizational activities which indicate that they will be active in the management of an applicant, their interests will be attributed for integration purposes. *Coast TV*, 5 FCC Rcd 2751 (1990). Finally, where allegedly passive owners are active in the management of the applicant, and the "applicant has failed to demonstrate reliably that nominally controlling principals will in fact exercise control [over the applicant] or has otherwise left fundamental uncertainty about the true nature of its organizational structure," no integration credit will be awarded. *Royce International Broadcasting*, 5 FCC Rcd 7063, 7064 ¶ 10 (1990). *See* also *Evergreen Broadcasting Company*, 6 FCC Rcd _____ ¶ 12 (1991).

24. Ten of RBG's partners have formed a "Cash Availability Group" (CAG) to finance RBG's application. They have made payments to RBG's FCC counsel. If RBG is successful in obtaining the construction permit, the CAG has the option of treating the loans as a capital contribution. Motion to Reopen and Enlarge Issues, filed February 28, 1991 by GBI, Exh. A, pp. 20-22 (RBG's Bankruptcy Disclosure Statement). GBI has failed to cite any other involvement stemming from the bankruptcy by the limited partners in RBG. RBG responds that limited partners can loan money to a partnership and that the payment of attorney fees by the CAG is not a material involvement in the applicant's affairs.

25. RBG is correct that loaning money to the partnership does not ordinarily constitute material involvement requiring the attribution of limited partners' interests.[16] *Attribution of Ownership Interests*, 58 RR 2d *supra* at 620. However, the payment of bills is ordinarily a management function. Thus, given RBG's precarious financial condition, it appears that the CAG could use the payments to FCC counsel as a method for overseeing the application. The Bankruptcy Disclosure Statement, *supra* at 22, also states that, if RBG "is successful in obtaining the FM construction permit, then the advances will, at the option of the CAG, be converted to capital contributions in an amount equal to five times the amount advanced by each member of the CAG." This provision gives the limited partners the authority to determine the final equity positions of the investors, which is usually a determination made at the time the agreement is executed. These facts raise questions warranting further hearings concerning the ability of the limited partners to influence the actions of the general partner and as to whether the limited partners are sufficiently insulated from involvement in the management or broadcast related activities of RBG to exempt them from the attribution requirements of the Commission's integration policies.[17] *Attribution of Ownership Interests*, 58 RR 2d *supra* at 619-20; *Royce International Broadcasting*, *supra*; and *Coast TV*, *supra*.

26. *Compliance with Section 1.65*: GBI argues that as a result of the bankruptcy RBG was obligated under 47 C.F.R. § 1.65 to advise the Commission of the change in

its integration proposal. That request will be denied. Section 1.65 reporting issues are warranted only where there is an intent to conceal facts from the Commission, or there is a pattern of repeated violations or other factors reflecting significant carlessness or inattentiveness. *Merrimack Valley Broadcasters*, 99 FCC 2d 680, 683-84 n.9 (1984). There is no allegation raising a significant question concerning any intent to conceal facts or a repeated failure to report changes in RBG's application. Thus, specification of a Section 1.65 issue is not warranted.

GBI's Application:

27. The Board cited allegations that one of GBI's non-voting shareholders, J.D. Longfellow, had been active in the prosecution of its application, and it noted inconsistencies in the testimony concerning the hiring of GBI's engineer and legal counsel, and the recruitment of investors. 5 FCC Rcd at 5291-92 ¶¶ 27-34. The Board, however, finding that these matters were not of decisional significance, did not resolve the questions raised in the exceptions concerning GBI's testimonial candor and its integration proposal. 5 FCC Rcd at 5293 ¶ 36. RBG argues that GBI was lacking in candor and that the ownership interests of its non-voting shareholders are attributable for integration purposes.

28. *GBI's Candor*: Dwayne Greene, GBI's sole voting stockholder, testified that on August 21, 1987, he retained Mark Prak as counsel and that he then retained Herman Hurst of Carl T. Jones Corp. as the applicant's engineer. Tr. 460-61, 532, 568-70. However, on August 19, 1987, Longfellow, using the letterhead of Great American Media, one of his broadcast interests, wrote a letter requesting the Carl T. Jones Corp. to prepare the engineering portion of GBI's application, and advising Hurst that he would be contacted by Prak as GBI's attorney, or by Longfellow, to work out the details for filing the application. The letter also stated, however, that the application would be filed by GBI with Dwayne Greene as president. Younts Exh. 4. The candor questions raised by the August 19 letter were fully examined during the hearing.

29. Longfellow denied hiring the engineer. He explained that the letter was merely meant to inform Hurst that, although GBI was a new entity, Hurst would be dealing with established broadcasters who were represented by counsel. Tr. 708. Longfellow maintained that he merely wanted to insure that the engineering work would be done, and that Greene hired the engineer. Tr. 709. Longfellow also denied hiring Prak. He asserted that he referred to Prak as "our attorney" because Prak was the attorney for his other broadcast interests. Tr. 645.

30. The ALJ stated that he had a full opportunity to observe the witnesses, that they looked the ALJ "full in the face" and used "their own accustomed language," and he concluded that they did not intentionally testify inaccurately and were credible witnesses. 4 FCC Rcd at 7997 ¶ 72. Finally, noting that the inconsistencies did not involve decisionally significant facts, the ALJ concluded that they were not a problem warranting further consideration. 4 FCC Rcd 800 n.22.

31. The ALJ's conclusions that Greene and Longfellow were not lacking in candor in their testimony is supported by the record. There has been no attempt to conceal Longfellow's involvement in the application. Longfellow admitted that he had contacted the engineer in order to get work on the application started. Tr. 639, 708. Although he was in contact with Prak because of his other interests, Longfellow denied hiring him to be GBI's counsel. Tr. 645. Despite the letter to Carl T. Jones Corp., the record corroborates GBI's claim that it was Dwayne Greene who hired Park and Hurst. Dwayne Greene testified that he knew Longfellow had previously used Prak, that he had discussed who to hire with Longfellow, and that after talking to other attorneys and engineers, he hired Prak and Hurst. Tr. 459, 461. Moreover, Longfellow's explanation of the letter is consistent with his other actions where he made initial inquiries concerning GBI's transmitter site and he introduced Greene to a banker, but was careful not to intrude upon Greene's authority to negotiate for the transmitter site or the bank loan. Tr. 474, 518, 658-61 and 669-71. *See also* ¶ 35 *infra*. Under these circumstances, and given the ALJ's credibility findings, we agree with the ALJ that the record supports a conclusion that, although both Greene and Longfellow were in contact with the attorney and engineer, it was Greene who hired them.[18]

32. *GBI's Integration*: Longfellow admitted his involvement in the prosecution of GBI's application. Longfellow recruited Greene as GBI's sole voting owner, introduced Greene to his banker, discussed the hiring of counsel and an engineer with Greene, and helped solicit Hart as an investor. When GBI lost assurance of its transmitter site, Longfellow located a new site and negotiated an option to insure that GBI would have access to it. Tr. 473, 506, 668. Thus, Longfellow was involved in GBI's affairs after the filing of its application, and the interests of GBI's non-voting shareholders are attributable to the applicant for integration and diversification purposes. *Coast TV*, *supra*.

33. The record, however, does not provide a basis to reject GBI's claim that Dwayne Greene will control the applicant. For example, although Longfellow negotiated an option for the antenna site, he was not involved in negotiating the lease. Longfellow advised the owner of the site that Greene was the applicant's principal, that he (Longfellow) was not authorized to negotiate a lease and that Greene would negotiate the actual terms of the lease. Tr. 474, 669-71. Similarly, although Longfellow introduced Greene to a banker who arranged financing for Great American Media, it was Greene who negotiated GBI's loan. Longfellow advised the banker that she would have to negotiate with Greene, and he was not involved in negotiating the financing. Tr. 518, 658-61. While it is undisputed that Longfellow inappropriately injected himself into the activities of GBI and that he was willing to help Greene when needed, it is also clear that he was careful not to usurp Greene's overall decision making authority over the applicant. It is clear as well that Greene has a legitimate interest in GBI and that he has been active in the prosecution of its application. Under these circumstances, GBI is entitled to credit for the integration of Dwayne Greene's 36 percent ownership interest. *See Royce International Broadcasting*, 5 FCC Rcd at 7064 ¶ 9.

34. ACCORDINGLY, IT IS ORDERED, That the Motion to Strike filed October 15, 1991 by Richardson Broadcast Group IS GRANTED and that Exhibits E and F attached to the Application for Review filed September 24, 1990 by Greene Broadcasting, Inc. ARE STRICKEN; that the Motion to Strike Reply Comments, filed January 22, 1991 by Richardson Broadcasting Group IS GRANTED and that the Reply to Comments of Mass Media Bureau filed January 8, 1991 by Greene Broadcasting, Inc. IS DISMISSED; and that the Motion to Strike parts

of the Opposition to Application for Review of Elizabeth M. Younts, filed January 22, 1991 by Richardson Broadcasting Group IS DENIED.

35. IT IS FURTHER ORDERED, That the Applications for Review filed September 24, 1990 by Greene Broadcasting, Inc. and December 26, 1990 by Richardson Broadcasting Group ARE GRANTED to the extent indicted herein, that the Decision of the Review Board, 5 FCC Rcd 5285 (1990), IS MODIFIED as reflected above; and that the application of Elizabeth M. Younts (File No. BPH-870824MH) for a construction permit IS DENIED.

36. IT IS FURTHER ORDERED, That Motion to Reopen the Record and Enlarge the Issues, filed December 28, 1990 by Greene Broadcasting Group IS GRANTED and that this proceeding IS REMANDED to Administrative Law Judge Walter Miller for further hearings on the following issues:

(a) To determine whether, in the light of the evidence adduced concerning its bankruptcy status, Richardson Broadcast Group is financially qualified.

(b) To determine whether, in light of the evidence adduced concerning their involvement in the applicant's activities, the interests of the limited partners of Richardson Broadcast Group are attributable for the integration and diversification analysis in this comparative proceeding.

37. IT IS FURTHER ORDERED, that Administrative Law Judge Walter Miller IS DIRECTED to prepare a Supplemental Initial Decision[19] and that the parties SHALL FILE exceptions thereto, if any, directly with the Commission.

38. IT IS FURTHER ORDERED, That the Motion for Leave to Amend filed November 26, 1991 by Richardson Broadcasting Group IS GRANTED, and that the amendment IS ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Also before the Commission are Comments filed January 4, 1991 by the Mass Media Bureau, a Reply to Application for Review filed January 9, 1991 by RBG and an Opposition filed January 10, 1991 by Younts, and a Reply to Comments of Mass Media Bureau filed January 8, 1991 by GBI. On October 15, 1990 RBG filed a Motion to Strike Exhibits E and F from GBI's Application for Review. GBI filed an Opposition on October 24, 1990. Exhibits E and F are magazine articles that have not been admitted into evidence. The Motion to Strike is granted. On January 22, 1991 RBG filed a Motion to Strike arguments in Younts' Opposition. On January 31, 1991 Younts filed an Opposition to the Motion to Strike. The arguments in Younts' Opposition are in response to the contentions in RBG's Application for Review. Thus, the arguments are proper and RBG's Motion to Strike Younts' Opposition is denied. On January 22, 1991 RBG filed a Motion to Strike the reply filed January 8, 1991 by GBI. GBI's pleading was filed in response to the Bureau's Comments on GBI's Application for Review. Pursuant to 47 C.F.R. § 1.115(f), replies to oppositions may only be filed if requested by the Commission. The Commission did not request reply pleadings in this case. RBG's Motion to Strike is granted and GBI's Reply is dismissed.

[2] In a Memorandum Opinion and Order, FCC 91I-011, released February 5, 1991, the Office of General Counsel, under delegated authority, directed the parties to file comments on whether RBG's proposed station would expose workers or the general public to radiation levels in excess of the American National Standards Institute (ANSI) guidelines. Now before the Commission are Comments filed February 15, 1991 by Younts, GBI, RBG and the Bureau, and Replies filed February 27, 1991 by RBG and GBI and February 28, 1991 by Younts.

[3] RBG filed an Opposition on January 22, 1991. On May 14, 1991, GBI filed a Supplement to the Motion to Reopen the Record and Enlarge the Issues.

[4] On December 6, 1991, Younts filed Comments arguing that the amendment fails to resolve the issues raised concerning RBG's financial qualifications.

[5] If Mrs. Younts were first told by her husband in August 1987 that he would be integrated, he could not have told her "a year-and-a-half before his application was filed," since the application was filed in August 1987.

[6] Mrs. Younts also lacked candor in testimony about her age and whether she was retired. First she testified that she was born in 1922. Then, after she was shown her driver's license, she admitted that she was born in 1919. When asked why she testified falsely about her age, Younts replied:

> I didn't want the powers-that-be of the FCC to think I was too old and I did not want to be discriminated against because of my age.

Tr. 434. Thus, while the testimony may have been unimportant in itself, the record establishes that Younts knowingly gave false testimony about her birthday in order to avoid an unwarranted expectation of adverse consequences from the Commission. Younts also stated in a deposition that she was retired. During the hearing, when asked about her ability to work full time, she became evasive and testified that she is semi-retired. Tr. 320-29. When asked why she changed her testimony, Younts replied that "Perhaps I got more interested in owning this FM station, and I considered that now I am not retired . . ." Tr. 329. Thus, as Younts became more involved in the proceeding, she testified in a manner which she believed would enhance her prospects of securing the new FM construction permit.

[7] Although the ALJ found that Younts was inconsistent in her testimony concerning her broadcast experience (4 FCC Rcd at 7994 ¶¶ 47-48), we agree with the Board (5 FCC Rcd at 5286 ¶ 7) that the record with respect to this matter does not support an adverse finding. Tr. 330-32. GBI and RBG also argue that Younts' application should have been dismissed under 47 C.F.R. § 73.3573(b) due to an amendment substituting Elizabeth Younts for Jack Younts, as the applicant. This argument is without merit. The death of Jack Younts provided good cause for the amendment of Younts' application. In any event, in view of our finding that Younts is not qualified to be a licensee, the argument concerning 47 C.F.R. § 73.3573 has no decisional significance.

[8] As explained by the Board, in the absence of an Environmental Impact Statement detailing the alleged environmental hazards in RBG's proposal, which was never prepared in this

case, the ALJ lacked authority to conduct hearings on environmental matters. *See* 47 C.F.R. § 1.1308 *et seq*. However, parties are entitled to raise objections to the Bureau's determination of no adverse environmental impact in conjunction with applications for review of the Board's final decision. *See* 47 C.F.R. § 1.115(e). The General Counsel asked for comments on and we are considering the parties' underlying objections to the Bureau's no hazard determination in conjunction with our review in this order of the Board's decision.

[9] Under the ANSI guidelines exposure is averaged over *any* six-minute period. Thus, exposure to radiation *per se* is not considered dangerous. Only prolonged exposure in excess of the recommended guidelines is considered a hazard, and exposure which is controlled so as not to exceed the guidelines is not cause for concern. OST Bulletin *supra* at 28.

[10] In this connection, it is reasonable to assume, absent *prima facie* evidence to the contrary, that applicants and licensees will comply with their responsibilities under the Commission's environmental rules.

[11] GBI argues that RBG's showing should not be considered because RBG failed to develop these facts on the record during the hearing and its additional statement is not part of that record. We view RBG's showing as a supplemental EA filed at the Commission's request in light of the new circumstances presented by the sale of WEEB. Since initial EA's are evaluated by the Bureau as a pre-hearing matter, we believe it is appropriate for the Commission to evaluate the supplemental EA without testimony on the record before the ALJ. Only if the Commission were to determine that it is appropriate to add a new environmental issue and the Bureau then submits an Environmental Impact Statement would testimony on the record before an ALJ be appropriate.

[12] Note 2 reads:

> actions necessary to bring the area into compliance with the guidelines shall be the shared responsibility of all licensees . . . whose transmitters produce fields at the area in question in excess of 1% of the exposure limits applicable to their transmitter.

[13] They initially requested enlargement of the issues within 15 days after the publication of a notice that the NCNB Bank has instituted foreclosure proceedings against RBG. *See* 47 C.F.R. § 1.229.

[14] Under Chapter 7 of the Bankruptcy Act, a trustee would be elected by RBG's creditors who would be authorized to "collect and reduce to money the property of the [RBG's] estate . . . as expeditiously as is compatible with the best interests of parties in interest." 11 U.S.C. § 703. Under Chapter 11, RBG would "retain all or any part of the estate" and continue operation under a plan for reorganization approved by the Bankruptcy Court. 11 U.S.C. § 1123.

[15] In a Memorandum Opinion and Order, FCC 89M-1505, released May 19, 1989, the ALJ denied Yount's request finding that it was untimely, that the showing was ambiguous, and that, based on his observation of the witnesses, Richardson was a truthful and honest witness.

[16] *See*, for example, *Anchor Broadcasting, Limited Partnership*, 6 FCC Rcd 721, 723-24 ¶ 15 (1991), where the Commission found that the lending of money by limited partners, beyond that which was required by the partnership agreement, did not undermine the agreement. However, it should be noted that there was no showing that the limited partners were involved in paying the partnershp's bills or were otherwise using the loans to monitor the management of the partnership or to exert influence over the general partner.

[17] In this regard, we also note that Felton Capel, a limited partner in RBG, with a 3.55 per cent equity interest, provided unpaid service to RBG by broadcasting local high school athletic events while RBG was the licensee of WEEB. Tr. 207-08. The record further shows that Margaret Walsham, a former limited partner, worked as Operations Manager of WEEB. She was also acting manager of WEEB after Richardson's accident. She withdrew from RBG in July, 1987 pursuant to advice from counsel. Tr. 210-12. The involvement of these limited partners likewise raises questions concerning the adequacy of RBG's limited partnership's insulation provisions to ensure that limited partners will not be involved in the operation of RBG's proposed FM station and thus, whether the interests of the limited partners should be attributed for comparative purposes.

[18] Younts and RBG also asserted that questions concerning Greene's candor were raised by the recruitment of GBI's other limited partner, Judith Hart, but the transcript fails to reflect any conflict on this point. Longfellow testified that he contacted Hart and recommended this application as an investment. Tr. 690. Dwayne Greene testified that he solicited her as an investor. Tr. 538. Hart confirmed that she talked with both Longfellow and Greene about investing in GBI. Tr. 724-26. The fact that Greene and Longfellow may have both talked to Hart about investing in GBI does not raise a candor question concerning Greene's recruitment of Hart as an investor.

[19] The ALJ is also directed, consistent with the efficient and orderly resolution of the cases pending before him, to expedite his consideration of the further hearings pursuant to the procedures set forth in the *Hearing Reform Report and Order*, 6 FCC Rcd 157 (1990), *reconsideration granted in part*, 6 FCC Rcd 3403 (1991). In this regard, we direct GBI to file a motion concerning discovery procedures within 10 days from the release date of this Memorandum Opinion and Order. Finally, absent good cause, any such discovery shall be completed within 30 days of the ALJ's action on such motion. *See Hearing Reform*, 6 FCC Rcd at 161 ¶ 30; 47 C.F.R. § 1.229(e).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 90.173 of the Commission's Rules and Regulations Concerning Shared Use of Paging Frequencies — RM-7837

ORDER

Adopted: February 12, 1992; Released: February 24, 1992

By the Chief, Private Radio Bureau:

1. On October 3, 1991, the Association for Private Carrier Paging Section of the National Association of Business and Educational Radio, Inc. (NABER) petitioned to amend Section 90.173 of the Commission's Rules, 47 C.F.R. § 90.173.[1] NABER asks that they "be able to make a. . . recommendation" to the Commission that licensees on congested paging channels employ paging terminal connection equipment or other means to prevent the simultaneous seizure of channels.[2] NABER also asks that they be able to make a similar recommendation with regard to new applicants for shared channels, and make employment of paging terminal connection equipment a pre-condition for licensing in congested areas.[3] Three private carrier paging licensees filed comments in support of the Petition.[4] We find that further action on the NABER Petition should not be taken because our existing Rules adequately address the identified concerns. As a certified frequency coordinator, NABER can recommend conditions for licensing as part of their frequency assignment recommendation. The Commission then decides whether to impose the conditions, based on the facts at hand.

2. The Commission has consistently required licensees to cooperate in the selection and use of frequencies to reduce interference. Where harmful interference does occur, affected licensees are also required to cooperate in resolving such problems.[5] In this respect, certified frequency coordinators may choose to make informal recommendations to the Commission regarding possible approaches to reducing interference as part of their responsibility to assist licensees in resolving post-licensing disputes.[6] If the licensees are unable to resolve the interference through mutually satisfactory arrangements, then the Commission has discretion to impose whatever operational conditions it sees fit to facilitate sharing among co-channel users.[7]

3. Requiring licensees to install terminal connection equipment is one of a variety of approaches that we currently may take in order to resolve such interference conflicts. The public interest is best served through retaining our existing flexibility to approach each interference complaint on a case-by-case basis. In this way, we may objectively consider each situation and tailor a solution that is fair to all licensees involved. We therefore decline to formalize or amplify existing mechanisms for reviewing recommendations of coordinators as to resolution of interference conflicts.

4. Accordingly, pursuant to Sections 0.331, 1.401 and 1.407 of the Commission's Rules, 47 C.F.R. §§ 0.331, 1.401 and 1.407, IT IS ORDERED that the petition filed by the Association for Private Carrier Paging Section of NABER, RM-7837, IS DISMISSED.

5. For further information, contact Martin Liebman, Rules Branch Private Radio Bureau, (202) 634-2443.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

[1] *See*, RM-7837, appearing on Public Notice October 28, 1991.
[2] NABER Petition at iv.
[3] NABER Petition, 9-10.
[4] Comments were received from CSSI, Inc., SIGNET Paging, Inc., and PacTel Paging.
[5] *See* 47 C.F.R. § 90.173(b).
[6] Frequency Coordination in the Private Land Mobile Radio Services, 103 FCC 2d 1093, 1107 (1986).
[7] 47 C.F.R. § 90.173(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Notice of Apparent Liability for Forfeiture Issued to Dakos Broadcasting, Inc., for Stations WOKD/WXKT(FM), Arcadia, Florida	File Nos. BR-880923YF and BRH-880923YE

MEMORANDUM OPINION AND ORDER

Adopted: January 31, 1992; Released: February 24, 1992

By the Commission:

1. The Commission has before it for consideration a Notice of Apparent Liability (NAL) for forfeiture released June 21, 1990, to Dakos Broadcasting, Inc., which was then the licensee of Stations WAPG/WOKD-FM, Arcadia, Florida. *Letter to William N. Dakos, President, Dakos Broadcasting Inc. re: Station WAPG/WOKD* (FM), 5 FCC Rcd 1704 (1990) *(Letter)*.[1] The NAL imposed a forfeiture of $18,000 on Dakos Broadcasting, Inc. It was imposed for repeated failures to comply with the Commission's Equal Employment Opportunity (EEO) provisions. 47 C.F.R. Sections 73.2080 (b)(3), (b)(5), (c)(2) and (c)(5).

2. The NAL set out a record of inadequate EEO efforts, which we incorporate herein by reference. Dakos Broadcasting, Inc. has not responded to the NAL.

3. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b), that Dakos Broadcasting, Inc. FORFEIT to the United States the sum of eighteen thousand dollars ($18,000) for failing to comply with the Commission's EEO provisions. 47 C.F.R. Sections 73.2080 (b)(3), (b)(5), (c)(2) and (c)(5). Full payment of the forfeiture may be made by mailing to the Commission a check or similar instrument payable to the Federal Communications Commission within 30 days of the release date of this Order. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, 47 C.F.R. Section 1.80 and Section 504(a) of the Communications Act of 1934, as amended, 47 U.S.C. Section 504(a), as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] The license was assigned after expiration of the license term to Gulf Dunes Broadcasting, Inc. The call letters for WAPG were changed to WOKD and the call letters for WOKD(FM) were changed to WXKT(FM).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition for Reconsideration of
Sanctions Imposed on Gulf Dunes
Broadcasting, Inc., Licensee of
Stations WOKD/WXKT(FM), Arcadia,
Florida, for EEO Deficiencies
in License Renewal Application

MEMORANDUM OPINION AND ORDER

Adopted: January 31, 1992; Released: February 24, 1992

By the Commission:

I. INTRODUCTION

1. The Commission has before it a petition for reconsideration of its By-Direction Letter released June 21, 1990, *Letter to William N. Dakos, President, Dakos Broadcasting, Inc., re: Station WAPG/WOKD (FM)*, 5 FCC Rcd 3748 (1990) (*Letter*). In that *Letter*, the Commission concluded that Dakos, the former licensee of Stations WOKD/WXKT(FM),[1] failed to comply with the Commission's affirmative action rules. *See* 47 C.F.R. Sections 73.2080(b)(3), (b)(5), (c)(2) and (c)(5). Accordingly, the Commission renewed the licenses for WAPG/WOKD(FM) for less than a full term subject to reporting conditions for three years and imposed a Notice of Apparent Liability (NAL) for $18,000 on Dakos.[2] Gulf Dunes filed its petition for reconsideration of the reporting conditions and short term renewal on July 6, 1990. Therein, Gulf Dunes requests that the Commission eliminate the reporting conditions and grant renewal of the license for a full term. Herein, the Commission finds that there is no basis on which to reverse the decision contained in the June 21, 1990 *Letter*.

II. BACKGROUND

2. After examining the license renewal application for WAPG/WOKD(FM), the Commission found that Dakos' Equal Employment Opportunity (EEO) program failed to include contacts with productive minority referral sources and failed to show adequate self-assessment of its program. The renewal application and Dakos' responses to the Commission's inquiry revealed that it received only one minority referral from its sources and two minority applicants for the 31 full-time jobs filled during the four-year period ending in September 1988. Dakos hired no minorities for full-time positions during its seven-year license term. Accordingly, on June 21, 1990, the Commission renewed the licenses for a short term, imposing reporting conditions and a Notice of Apparent Liability for $18,000.

III. PLEADINGS

3. In support of its request for reconsideration of the short term renewal and reporting conditions, Gulf Dunes makes three contentions. The contentions stem from its main argument that the Commission should not have applied *Letter to Mark L. Woolfson, Sr., President, Woolfson Broadcasting Corporation*, 4 FCC Rcd 6160 (1989) (*Woolfson*), to the instant case. First, citing to *Application of Rust Communications Group, Inc.*, 61 FCC 2d 548 (1976), *affd. on recon.*, 64 FCC 2d 632 (1977) (*Rust*), Gulf Dunes contends that *Woolfson* is contrary to Commission precedent. Moreover, in addition to maintaining that *Woolfson* is wrongly decided, Gulf Dunes contends that *Woolfson* does not support imposing a sanction in a case in which the Commission has not reviewed the assignee's record. Accordingly, it argues that the Commission should overturn *Woolfson*. Secondly, Gulf Dunes argues that *Woolfson* is distinguishable from the instant case. It notes that, unlike the sequence of events in *Woolfson*, the Commission granted the assignment in the instant case six months before it granted the renewals to the former licensee. Therefore, Gulf Dunes argues, it consummated its purchase of the stations prior to the Commission's determination that the stations had a record of EEO deficiencies. Finally, it argues that the Commission should not punish it with sanctions because it did not know of the assignor's EEO record and took control of the stations without notice of possible sanctions.

IV. DISCUSSION

4. Reconsideration is appropriate where the petitioner shows either a material error or omission in the Commission's decision or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters. *See WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); 47 C.F.R. Section 1.106(c). Applying this standard, reconsideration of the *Letter* is not appropriate as discussed below.

5. Gulf Dunes argues that the Commission's policy, as articulated in *Woolfson*, is inconsistent with precedent. We disagree. In *Woolfson*, we discussed in great detail why we view the imposition of reporting conditions and short term renewals as necessary remedial tools, not punishments. We also have discussed at length why such remedial tools should be used, even when a station under review is being sold. In concluding that these actions were in the public interest we stated:

> Once we have determined that only short-term renewal with conditions is appropriate, the remaining issue is whether we should refrain from imposing these prospective remedies when, as in this case, an assignment application is pending . . . Because the short-term and reporting conditions serve a largely remedial function -- ensuring that the facility is operated in compliance with our EEO rules -- we see no public interest reason not to impose those measures in a case where they are otherwise appropriate, simply because the license is being assigned. Such an approach would permit a station with defective EEO performance to be passed to different

> owners over a period of time without having to comply with our EEO rules. That approach would not serve the public interest.
>
> Similarly, it would not be appropriate to refrain from imposing prospective remedies merely because there is no evidence that the assignee will not comply with our EEO rules. If it chose to focus on the proposed buyer, the Commission would need to enter the morass of having to examine each buyer's worthiness for arguably different treatment. Such an exercise would be difficult and time-consuming and, above all, would not be an effective means of ensuring future EEO compliance at stations where the assignor did not maintain an adequate EEO program. We do not believe that any unfair burdens are imposed on entities that knowingly purchase such stations by requiring them to be subject to the same limitations and conditions as the existing licensee would be if it chose to keep its station . . . Therefore, once we have determined that particular EEO remedies are appropriate, they are to be implemented by whomever is operating the station, whether that licensee was the one responsible for the violations or is simply the successor-in-interest to the former licensee.

Woolfson, at 6160-61.

The clear and exhaustive discussion in *Woolfson* expresses our rationale for permitting remedial sanctions to pass with the license to the buyer. To the extent that *Rust* is inconsistent with *Woolfson*, we note that *Woolfson* has clearly articulated our policy on this issue for a number of years and is controlling. [3]

6. Gulf Dunes' argument that it had no knowledge of the former licensee's EEO performance and no notice that the Commission might impose conditions is without merit.[4] First, it unquestionably knew that it was taking licenses the renewals of which were awaiting Commission action. When the Commission approved the assignment, Gulf Dunes knew that the assignment was subject to whatever action the Commission would take on the pending renewal applications because this condition was specified in the assignment grant. Thus, Gulf Dunes was aware of the possibility that remedies might be deemed necessary. Further, although it did not know exactly what action the Commission would take on the stations' renewal applications, Gulf Dunes knew, or should have known, that the stations had questionable EEO programs and that renewals for less than a full term and reporting conditions were possible remedies for flawed EEO programs. Gulf Dunes knowingly accepted a conditional assignment and cannot now complain that it acquired the stations with ignorance of the issues that impeded the license renewals.

7. At any rate, a buyer cannot receive any greater license rights than a seller is entitled to obtain. In this case, the Commission determined that renewal was in the public interest only under certain conditions. Thus, the buyer could obtain no greater rights than a conditional assignment.

V. CONCLUSION

8. The licensee failed to present new evidence to support its contention that the stations' EEO record warrants sanctions other than those imposed in the *Letter*. Further, it also failed to show any material error or omission in the *Letter*. In addition, we note that the factors which the Commission takes into account when determining appropriate remedies for a record of deficient EEO performance were considered adequately. Considering all these factors and taking into account the arguments put forth in the licensee's petition, as addressed above, we find that the original *Letter* imposing a short-term renewal and reporting conditions on the current licensee is appropriate.

VI. ORDERING CLAUSE

9. Accordingly, IT IS ORDERED, that the petition for reconsideration is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] By way of background, on September 21, 1989, the Commission approved an assignment of the stations' licenses from Dakos Broadcasting, Inc., the former licensee, to Gulf Dunes Broadcasting, Inc., the present licensee, with the condition that the assignment could not be consummated until the disposition of the then pending renewal applications. On November 30, 1989, the Mass Media Bureau approved the assignment "conditioned upon whatever action is taken on the pending license renewal applications" for the stations. The licenses were assigned on December 15, 1989. Gulf Dunes changed WAPG's call letters to WOKD on June 20, 1990 and changed WOKD(FM)'s call letters to WXKT(FM) on November 12, 1990.

[2] Dakos has not paid or responded to the NAL and the Commission is submitting a separate Notice of Forfeiture against Dakos.

[3] Our decision here is not inconsistent with cases the assignee cites as additional support for its position. *See Rules and Policies to Further the Advancement of Black Americans in Mass Communications*, 76 FCC 2d 385 (1980); Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees, 42 FCC 2d 522 (1975); *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 628 (D.C. Cir. 1978); National Broadcasting Company, Inc., 58 FCC 2d 419, 422 (1976). These cases do not speak to the question of enforcing the EEO Rule in assignment cases.

[4] Although the current licensee correctly points out that the assignments in the instant case and *Woolfson* were granted at different times during the renewal process (six months before the renewal versus the same day, respectively), we find that the distinction is without significance to the sanctions imposed for the reasons discussed below.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
February 14, 1992

Released: February 24, 1992

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

L.M. Communications 8210-MD
of South Carolina, Inc. C5-932
Licensee, Radio Station WYBB(FM)
59 Windermere Boulevard
Charleston, SC 29407

Dear Licensee:

This letter constitutes a Notice of Apparent Liability for a forfeiture pursuant to Section 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules.

On April 24, 1991, after receiving a complaint alleging that Station WYBB(FM), Folly Beach, South Carolina, may have broadcast indecent language in violation of 18 U.S.C. Section 1464, we asked for your comments concerning certain material broadcast during "The Morning Show" of August 8, at approximately 9 a.m., and August 24, 1990, at approximately 6:06 a.m. Transcripts of the relevant passages, taken from a tape submitted with the complaint, were attached to our inquiry. A transcript of the August 8 material is also appended here.

You have replied that both broadcasts were clear violations of your internal operating policies, and that you instituted punitive and remedial actions immediately after learning that the broadcasts had occurred. Among other things, the disc jockeys involved were severely admonished, and two were suspended without pay for three days and placed on 90-day probation. You argue, moreover, that the indecent language in each broadcast was a fleeting and isolated occurrence within unscripted and completely spontaneous live programming. Citing, *inter alia*, the Commission's decision in *Pacifica Foundation Inc.*, 2 FCC Rcd 2698 (1987) (*Pacifica II*), you contend that under these circumstances the complaint against WYBB(FM) should be dismissed and that no sanctions should be imposed.

Section 1464 of Title 18 of the United States Code prohibits utterances of "any obscene, indecent or profane language by means of radio communication." Pursuant to Sections 312(a)(6) and 503(b)(1)(D) of the Communications Act, the Commission has statutory authority to take appropriate administrative action when licensees broadcast material in violation of 18 U.S.C. Section 1464. The Commission has defined indecency as language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs. The United States Court of Appeals for the District of Columbia Circuit has upheld the Commission's authority to restrict the broadcast of indecent material at times when there is a reasonable risk that children may be in the audience. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

We are persuaded by your argument that the August 24 broadcast contained only a fleeting and isolated utterance which, within the context of live and spontaneous programming, does not warrant a Commission sanction.

The August 8 broadcast is a different matter. While it also occurred in the context of live and spontaneous programming, the scatological material as broadcast involved a deliberate and repetitive use of the word "crap" to heighten the audience's awareness of and attention to the subsequent use of the term "shit" by the announcer. Such willfully focused use is patently offensive and inconsistent with any contention that the passage at issue represented an incidental remark. Moreover, the material fits within the definition of indecency, since it contained patently offensive language concerning excretory activities and occurred at a time of day (approximately 9 a.m.) when children were likely to have been in the listening audience.

Thus, it appears that on August 8, 1990, Station WYBB(FM) violated 18 U.S.C. Section 1464 by airing indecent programming. Accordingly, pursuant to Section 503(b) of the Communications Act, L.M. Communications of South Carolina, Inc., is hereby advised of its apparent liability for a forfeiture of three thousand seven hundred fifty dollars ($3,750).

The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Act and the guidelines described in our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. pending*. Under these standards, $12,500 is the base forfeiture for the transmission of indecent or obscene material. The violation in this case, however, is mitigated by its relatively minor nature. Accordingly we find that a forfeiture in the amount of $3,750 is appropriate.

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. § 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

ATTACHMENTS

Radio Station WYBB (FM), Folly Beach, South Carolina
The Morning Show, Wednesday, August 8, 1990, approximately 9 a.m.

MV: Male Voice

MV2: Second Male Voice

MV: (Unintelligible) Maybe it's nine.
MV2: I don't know and who really gives a crap?
MV: Oh, oh.
MV2: No, we can say crap.
MV: We can say crap?
MV2: Yeah.
MV: Crap, crap, crap, crap, crap, crap.
MV2: That's right, just can't say shit.
MV: Oh, then we won't.
MV2: That's right.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Intellicall Vending, Inc., Transferor, and Alpha Pay Phones -- IV, L.P., Transferee,

File No. I-T-C-92-012-TC

Application for Authority to Transfer International Resale Authorization of Intellicall Vending, Inc.

MEMORANDUM, OPINION, AND ORDER

Adopted: February 7, 1992; Released: February 24, 1992

By the Chief, International Facilities Division:

1. On October 8, 1991, Intellicall Vending, Inc. (Vending) and Alpha Pay Phones -- IV, L.P. (Alpha) filed an application requesting authority pursuant to Section 214 of the Communicatiions Act, as amended, 47 U.S.C. § 214, and Section 63.01 of the Commission's Rules, 47 C.F.R. § 63.01, to transfer the recently granted Section 214 international resale authorization of Vending to Alpha in connection with the acquisition of Vending's assets by Alpha. The parties state that they have consummated the transaction without first seeking Commission consent. The application was placed on public notice on October 16, 1991. No comments were received.

2. The parties state that Vending is a Delaware corporation that applied on July 31, 1991, for a Section 214 authorization to provide resold international message telecommunications services (IMTS) between the U.S. and overseas points by reselling the switched voice services of AT&T, MCI, US Sprint, and Intellicall Operator Services, Inc. That application was granted in an Order released on September 9, 1991.[1] According to the application, Vending does not currently have a tariff on file because of the recency of the grant of its authorization. Alpha is a limited partnership registered in Delaware and according to the application is a carrier subject to Section 214 of the Act. Alpha states that it will file a tariff with the Commission upon grant of this application. Vending and Alpha state that no foreign entity holds any direct or indirect ownership interest in Alpha and all of its general and limited partners are U.S. citizens.

3. Vending and Alpha state that on September 1, 1991, Vending executed an Asset Purchase Agreement transferring substantially all of its physical assets, including pay telephone equipment, and pay telephone location contracts, to Alpha. They further state that Vending remains a corporate entity. They assert that Alpha will continue serving Vending's customers, which include the transient public (hotel/motel guests, pay telephone users, etc.).

4. The applicants state that the proposed transaction would benefit the transient public, which increasingly requires the convenience of international telecommunications services for business and personal reasons. They assert it would serve the public interest by permitting Alpha to enter the international market in order to serve the needs of the transient public better. Further, applicants state that competition in this market will serve to increase the available service offerings, as well as reduce the cost of international communications to end users.

5. In view of the foregoing, we conclude that Vending's transfer of its Section 214 authorization to provide international switched voice resale services to Alpha will serve the public interest. It will permit better service to the transient public and may serve to increase available service offerings and reduce end user costs. This authorization is without prejudice to any further action the Commission might take with respect to Alpha's acquisition of Vending's assets without appropriate authorization.

6. Accordingly, IT IS ORDERED that the application of Intellicall Vending, Inc., and Alpha Pay Phones -- IV, L.P., File No. I-T-C-92-012-TC, IS GRANTED and Intellicall Vending, Inc. is authorized to transfer the Section 214 authorization in File No. I-T-C-91-164 (see n.1) to Alpha Pay Phones -- IV, L.P.

7. IT IS FURTHER ORDERED that the Alpha shall file a tariff pursuant to Section 203 of the Communications Act of 1934, as amended, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this order.

8. IT IS FURTHER ORDERED that Alpha shall file annual reports of overseas telecommunications traffic as required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

9. IT IS FURTHER ORDERED that One Call is limited, under this order, to the provision of international switched voice services by the resale of the international switched voice services set forth in Intellicall Operator Service's Tariff F.C.C. No. 1, AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI Tariff F.C.C. No. 1 and US Sprint Tariffs F.C.C. Nos. 1 and 2 between the U.S. and the international points listed in the aforementioned tariffs in accordance with Vending's previous authorization in File No. I-T-C-91-164 (see n.1).

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities
Division
Common Carrier Bureau

FOOTNOTE

[1] *See Intellicall Vending, Inc.*, File No. I-T-C-91-164, 6 FCC Rcd 5276 (1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

IDB COMMUNICATIONS GROUP, INC. File No. I-T-C-89-100

For Blanket Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, to Establish Channels of Communication Between the U.S. and the U.S.S.R. and Other Eastern European Countries via the Intersputnik Satellite System for the Provision of Occasional Use Video and Program Audio Services

IDB COMMUNICATIONS GROUP, INC. File Nos. CSG-89-115-ML CSG-89-116-ML

For Authority to Modify its Construction Permit and License for two 4/6 GHz 15.2-Meter International Earth Stations at Staten Island, New York to Add the Soviet Intersputnik System as a Point and to Add SCPC Audio Service to All Points of Communication

CABLE NEWS NETWORK, INC. File No. CSG-90-071-P/ML-(A)

For Modification of License for its 4 GHz 11.3-Meter Earth Station at Atlanta, Georgia (E900466) to Add Ghorizont 4 and 7 Satellites as Points of Communication to Down-link Soviet Television Programming and Occasional News Feeds from the Soviet Union and Other Eastern European Countries

WASHINGTON INTERNATIONAL TELEPORT, INC. File No. I-T-C-89-142

For Blanket Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, to Establish Channels of Communication between the U.S. and the U.S.S.R. and other Eastern European Countries which are not Members of INTELSAT via the Intersputnik Satellite System for the Provision of Occasional Use Video and Program Audio Services

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: February 12, 1992; Released: February 25, 1992

By the Deputy Chief, Common Carrier Bureau:

1. Under consideration are the above-captioned applications filed by IDB Communications Group, Inc. (IDB), Cable News Network, Inc. (CNN) and Washington International Teleport, Inc. (WIT) requesting authority pursuant to Section 214 and Title III of the Communications Act of 1934, as amended, to communicate with satellites in the Soviet Union's Intersputnik satellite system for the provision of occasional use video and program audio services and receive-only television services between the U.S. and the Soviet Union and other Eastern European countries.[1] The applications were placed on public notice and comments were filed by the Communications Satellite Corporation (Comsat), in response to which, IDB and CNN filed replies.

The Applications

2. CNN is the licensee of an 11.3-meter C-band satellite earth station located at Atlanta, Georgia, Call Sign E900466. In 1985, CNN was conditionally authorized by the Common Carrier Bureau to use this earth station to downlink Soviet domestic television programming transmitted via the Ghorizont 12 satellite located in the geostationary arc at 14 degrees West Longitude (Statsionar 4).[2] Following a successful consultation under Article XIV(d) of the INTELSAT Agreement, CNN was granted final authorization to receive the Soviet programming on an incidental basis. [3] Pursuant to its authorization, CNN selects segments from the Soviet television programming that CNN deems to be newsworthy and incorporates these segments into CNN's regular news programming.

3. In the instant application, CNN seeks modification of its license in three respects. First, CNN requests to use the Ghorizont 12 (Statsionar 4) and Ghorizont 4 and 7 satellites (Statsionar 11) as points of communication for receiving Soviet television programming. CNN notes that the same public interest considerations that supported the authorization to down-link programming from Statsionar 4 also apply with respect to Statsionar 11. According to

CNN, Statsionar 11 is now the principal conduit for outgoing Soviet television transmissions, with Statsionar 4 being used for back-haul purposes. Thus, CNN asserts that it is necessary for it to have access to Statsionar 11 in order to have meaningful access to Soviet television programming. Second, CNN requests authority to downlink from Statsionars 4 and 11 occasional television news feeds incorporating reports from CNN's correspondents in the Soviet Union and other countries in Eastern Europe.[4] In support of this request, CNN states that it is not feasible to use the INTELSAT system because of the limited number of earth stations in the entire region that are capable of communicating with the INTELSAT system. According to CNN, the scarcity of INTELSAT-compatible earth stations has severely hampered its newsgathering capabilities in Eastern Europe and has forced it to choose between costly terrestrial transmission links and slow antiquated delivery methods such as "bicycling" videotapes. CNN notes that the demands placed on it to provide timely reports from Eastern Europe have increased with the explosion of news stories emanating from that region as a result of recent political and policy changes.

4. With respect to available INTELSAT facilities, CNN states that it must compete with other broadcasters and news organizations for access to the new earth station in the Moscow area (at Bear Lake) that accesses INTELSAT's 332.5^{0}E satellite. CNN notes that the demand for the 332.5^{0}E satellite is so heavy that its access to the Bear Lake earth station is limited on average to five minutes every two weeks. Use of the other earth station in the Moscow area (at Dubna) is theoretically possible, but prohibitively expensive because the Dubna earth station communicates with the INTELSAT primary path satellite located at 335.5^{0}E. CNN notes that since it does not have an earth station in Atlanta pointed at the 335.5^{0}E satellite, it would have to "double hop" transmissions from Dubna to Etam, West Virginia, and from there to its headquarters in Atlanta.[5] Although CNN expects to continue using the Bear Lake earth station for news transmission, it states that it needs access to additional satellite capacity in order to fulfill its news mandate.

5. Finally, CNN requests removal of certain conditions imposed on CNN's reception of Soviet television signals. Specifically, the CNN license was limited to a six-month term, which required periodic renewal, and was subject to immediate cancellation without a hearing. These conditions were imposed at the request of the State Department which cited the "continued media imbalance" with the Soviet Union. CNN believes that removal of these conditions is warranted in light of the remarkable improvement in U.S./Soviet reciprocal media access that has recently occurred. As evidence of this trend, CNN cites the availability of its programming in the Soviet Union and Poland and the prospect for expansion of its programming in the Soviet Union, Poland and other Eastern Bloc countries.

6. IDB operates a nationwide network of domestic and international transmit/receive earth stations and a fleet of transportable earth stations. In its applications, IDB requests authority to: (1) establish channels of communication via the Soviet Union's Intersputnik satellite system between existing and future earth stations owned and operated or leased by IDB in the U.S. and earth stations in the U.S.S.R. and other Eastern European countries which are not members of INTELSAT for the provision of occasional use video and program audio services; and (2) modify its construction permits and licenses for two identical 15.2-meter 4/6 GHz earth stations located at Staten Island, New York to add the Intersputnik satellite system as a point of communication and to add Single-Channel-Per-Carrier (SCPC) audio service to all points of communication.[6] In support of its request to use Intersputnik facilities, IDB states that existing INTELSAT facilities between the U.S. and the U.S.S.R. are inadequate due to insufficient transponder capacity for certain services at certain times and insufficient Soviet ground facilities to access INTELSAT. IDB notes that these conditions also apply to the provision of service to and from Eastern European countries. As a result, IDB states that most communications must be routed through an inefficient, costly and technically undesirable link through the U.S.S.R., which itself has insufficient facilities.

7. WIT is a common carrier which provides a range of international services, including switched-voice service, using its licensed international earth station facilities at Bren Mar, Virginia. In the instant application, WIT seeks authority to establish channels of communication via the Intersputnik satellite system between points in the Washington, D.C. metropolitan area and points in the U.S.S.R. and other Eastern European countries which are not members of INTELSAT for the transmission and reception of occasional use video and program audio services. Specifically, WIT requests authority to provide a maximum of three 36 MHz occasional use video channels and six program audio channels. WIT proposes to provide these services via its licensed earth station facilities or other earth stations authorized to communicate with the Intersputnik satellite system. In support of its request, WIT also cites the inadequacy of existing facilities between the U.S. and the U.S.S.R. and other Eastern European countries.

Comments

8. Comsat filed comments in response to the IDB and CNN applications. Comsat does not object to a grant of the applications provided that consultation under Article XIV(d) of the INTELSAT Agreement is completed and certain conditions are imposed to ensure that the Intersputnik satellite system is used only when INTELSAT facilities are unavailable. First, Comsat believes that the Intersputnik satellite system should only be used for service to and from the U.S.S.R. and other Eastern European countries that are not members of INTELSAT. Second, before using Intersputnik to transmit programming, Comsat would require the applicants to notify both the Commission and Comsat at least one week before the proposed transmission. Such notification would include, at a minimum, the date, time and duration of the transmission, the type of transmission and service provided, the points involved, and the space and ground segment facilities to be employed. Comsat states that this procedure would allow it to notify the Commission if INTELSAT could reasonably provide the proposed service in a particular case. Third, in the case of receive-only programming, Comsat would require the applicants to file semi-annual reports. Comsat acknowledges that there is no necessity to require this type of programming already being carried over the Intersputnik satellite system to be duplicated over the INTELSAT system. However, Comsat believes that such after-the-fact reports are necessary to ensure that use of Intersputnik for receive-only

programming is limited to that type of situation. Finally, Comsat believes that any authorization to IDB and CNN should be for a limited term so that the Commission could review the situation at regular intervals and take prompt action in the event that the use of Intersputnik is being abused.

9. CNN and IDB filed reply comments which oppose the proposed conditions suggested by Comsat. Using the Commission's treatment of transborder applications as a yardstick, CNN believes that once the U.S. has fulfilled its obligations under Article XIV(d) of the INTELSAT Agreement, no special conditions need be imposed. CNN notes that no such conditions have been imposed in connection with the Transborder policy. According to CNN, the Commission does not: (1) require transborder applicants to notify the Commission of each non-INTELSAT transmission; (2) require transborder applicants to file periodic reports; or (3) limit their transborder authority to a shortened term. IDB cites several reasons why a prior notification requirement would be impractical. First, IDB states that a prior notification requirement would impose substantial administrative costs on IDB which would be passed to customers in the form of higher prices for transmission services. Second, IDB asserts that a prior notification would not allow the Commission to determine if INTELSAT could "reasonably" provide the service because such a determination might be highly subjective in certain instances. Third, IDB claims that a prior notification requirement would necessitate public disclosure of a large amount of proprietary information which could be used by IDB's competitors to its competitive disadvantage.

Discussion

10. The Communications Satellite Act of 1962, 47 U.S.C. §§ 701-744, provides for U.S. participation and support of the INTELSAT global commercial satellite system. Accordingly, the United States is a Party to the INTELSAT Agreement, and is committed to a strong, viable INTELSAT system. However, the Satellite Act clearly does not require or contemplate the sole use of INTELSAT to satisfy U.S. requirements for international satellite services. It specifically provides for the creation of additional satellite systems if "required to meet the unique governmental needs or if otherwise required in the national interest." 47 U.S.C. §701(d).[8] The Commission has looked to the Executive Branch for determinations as to when use of non-INTELSAT facilities is in the national interest.[9] For example, Executive Branch determinations have formed the basis for the Transborder and Separate Systems policies.[10]

11. In the matter before us, the Department of State, in coordination with the National Telecommunications and Information Administration (NTIA), has provided the Commission with the conditions upon which we can authorize use of the Intersputnik satellite system consistent with U.S. foreign policy and the national interest.[11] As a separate matter, we additionally determine here that the applicants have satisfied the public interest standard of the Communications Act of 1934, as amended, 47 U.S.C. §214 and 47 U.S.C. §301 *et seq.*, and grant their applications subject to, *inter alia*, the conditions set forth by the Executive Branch.

12. The applicants propose to use Intersputnik facilities for: (1) the transmission and reception of occasional use video and program audio services between the United States and the Soviet Union and Eastern European countries which are not members of INTELSAT, and (2) the reception in the United States of video and program audio services carried primarily for distribution in the Soviet Union and Eastern Europe. Such use would primarily involve coverage by U.S. broadcasters of news and sports events in the Soviet Union and Eastern Europe. The State Department has informed us that it supports use of the Intersputnik satellite system for the first category of services in instances where INTELSAT space segment or earth segment facilities are unavailable or inadequate. It also supports expanded authorization of the second category of services beyond what has already been authorized to CNN.

13. The State Department has expressed concern with respect to the use of the Intersputnik satellite system based on its belief that neither INTELSAT nor other commercial systems could effectively compete on the basis of price with a non-market, government-subsidized system whose prices and costs may not bear a close relationship.[12] Because of this concern, the State Department believes that use of the Intersputnik satellite system should be monitored. Initially, the State Department requested that Commission approval of the instant applications be conditioned on the applicants providing INTELSAT, through the U.S. Signatory, with forty-eight hours advance notification of a service origination requirement except in instances such as late-breaking news events.[13] During the pendency of the instant applications, the State Department expressed its support for the use of the Intersputnik satellite system for the provision of other non-switched (i.e. private-line) services between the U.S. and the Soviet Union and other Eastern European countries based on the periodic unavailability of INTELSAT space segment and ground segment facilities.[14] In those instances, the State Department again expressed its concern with the use of the Intersputnik satellite system and requested that the authorizations be granted subject to review after six months by the Commission and the Executive Branch. The purpose of the review would be to enable a future examination of potential migration of traffic from commercial systems, as well as a review of any intervening market mechanisms which might obviate any existing concerns.

14. By letter dated September 10, 1991, the State Department clarified its position with respect to the degree of monitoring that would apply to the provision of television and other non-switched services such as private-line. It stated that it would not object to the carriage of non-public switched services, including television, subject to the periodic review it proposed in connection with private-line services.[15] We interpret the State Department's September 10, 1991 letter as superseding its previous request for the imposition of a forty-eight hour advance notification requirement with respect to television and audio services carried via the Intersputnik satellite system.

15. As detailed below, we grant the applications for transmission and reception of occasional use video and audio services subject to the conditions requested by the State Department. In light of the State Department's suggested conditions, we find that the more restrictive prior notification requirement proposed by Comsat is not necessary to protect the public interest.

16. *Receive-only services.* In considering CNN's 1985 application to construct an earth station at Ellenwood, Georgia to receive programming from the Ghorizont 12 satellite (Statsionar 4), the Common Carrier Common (Bureau) relied on an analysis similar to that previously applied in the case of receive-only, transborder video services. Although noting that INTELSAT could technically provide the service, we concluded that:

> "Because the signals carried over the Intersputnik system can be received in at least certain areas of the United States, CNN's reception of the Intervision programming would not require any new transmissions or change in the radiated power of the satellite, but merely the redistribution of existing programming. In this regard, it is similar to the transborder reception of programming which is a by-product of an existing network."[16]

In such instances, the Bureau noted, it would be doubtful that Intervision, the Soviet programmer, would want to incur the added costs associated with duplicating its programming over the INTELSAT system merely to be received by CNN and other U.S. telecommunications networks. The Bureau also noted that it would be unlikely that CNN would incur the costs involved in obtaining INTELSAT transmission facilities for the service when CNN could essentially receive the service free of charge.

17. The receive-only aspect of the instant applications is identical to CNN's previously authorized application to receive signals from the Ghorizont 12 satellite. The only difference is the addition of the Ghorizont 4 and 7 satellites (Statsionar 11), which CNN states is necessary because Statsionar 11 has become the primary conduit of Soviet television programming with Statsionar 4 being used for back-haul purposes. Under these circumstances, we find that the public interest would be served by a conditional authorization for the addition of Statsionar 11. In so doing, we hereby incorporate and reaffirm the Bureau's rationale in previously authorizing CNN to receive programming from Soviet satellites. As the Bureau noted in that authorization, the choice is between service over the Intersputnik satellite system or no service at all. Moreover, at its meeting held October 2-5, 1989, the INTELSAT Assembly of Parties decided, pursuant to Article XIV(d) of the INTELSAT Agreement, that use of Intersputnik space segment for reception (and transmission) of television and program audio services would not cause significant economic harm to the INTELSAT global system and would be technically compatible with existing and planned INTELSAT space segment. In fact, INTELSAT has previously recognized that this particular type of service is not likely to be carried over the INTELSAT system and would not raise serious problems or cause significant economic harm.[17]

18. CNN has also requested that certain conditions imposed on its previous authorization to receive signals from the Intersputnik satellite system be removed. Specifically, these conditions require CNN to renew its license at six month intervals and to file reports indicating its use of the Intersputnik programming as well as CNN's understanding of the uses of its programming by the Soviet Union. These conditions were requested by the State Department.[18] However, in view of the State Department's August 29, 1989 letter, they are no longer necessary. The State Department has no objection to the licenses being permanent rather than temporary so long as the authorization specifies that the license is subject to modification or revocation by the Commission upon a determination by the Secretary of State that continued operation of the authorized facilities is no longer consistent with U.S. foreign policy and the national interest.

19. *Transmission and reception of occasional use services.* The transmission and reception of occasional use video and program audio services raise issues which are separate and distinct from those involved in the reception of existing programming from the Intersputnik satellite system. Unlike the receive-only service, the occasional use video and program audio services have in the past been provided over the INTELSAT system and are capable of being provided over the INTELSAT system in the future assuming the availability of INTELSAT space segment and INTELSAT-compatible earth station facilities in the region. However, the applicants cite the general unavailability of INTELSAT space segment and the scarcity of INTELSAT-compatible earth stations as justification for their request to use Intersputnik facilities.

20. The periodic unavailability of both INTELSAT space segment and INTELSAT-compatible ground station facilities has been documented. There often is severe congestion on the INTELSAT 332.5-SE satellite, as evidenced during the visits of President Bush to Poland and Hungary in 1989. U.S. broadcasters and news organizations were authorized to use the Intersputnik satellite system to provide news coverage of the visit to U.S. audiences based, in part, on the unavailability of INTELSAT space segment.[19] Additionally, INTELSAT has decided to acquire additional satellite capacity in one or more ocean regions because of capacity shortages that are particularly acute in the Atlantic Ocean Region (AOR).[20] Comsat has indicated that, even with the increase in capacity with the deployment of the INTELSAT VI satellites, the system would still be operating at or near full capacity in the AOR for years to come.[21] With respect to C-band, there are only three unused 36 MHz equivalent transponders currently available for transatlantic traffic, of which only one zone transponder can be used for outbound U.S. traffic. All U.S. operators seeking to use the Intersputnik satellite system require C-band capacity to meet their needs.

21. With respect to the availability of INTELSAT-compatible ground segment facilities, there is a limited number of earth stations in the entire region that are even capable of communicating with the INTELSAT system. Demand by broadcasters and news organizations throughout the world to use INTELSAT's 332.5°E satellite for transmissions to and from the U.S.S.R. often severely limits access to the new Bear Lake earth station. CNN has stated that U.S. operator access to a second earth station in the Moscow area (at Dubna) that operates with INTELSAT's primary path 335.5°E satellite is theoretically possible, but prohibitively expensive.[22]

22. Additionally, use of Intersputnik facilities proposed by the applicants will not cause significant economic harm to INTELSAT. The services involved are part of the INTELSAT traffic data base. However, available traffic data reveals that such traffic accounts for an insignificant part of INTELSAT's traffic data base. Data from the "Intelsat Report" for 1990-91, 1989-90, and 1988-89, respectively, shows that the amount of occasional use television traffic carried over the INTELSAT system was 72,294 channel hours in 1990; 67,387 channel hours in 1989; 68,656 channel hours in 1988; and 55,778 channel hours

in 1987. Between the first quarter of 1988 and the first quarter of 1989, 257 half-channel hours of video programming were received in the U.S. from the U.S.S.R. via the INTELSAT system. During this same period, only 96 half-channel hours of video programming were transmitted from the U.S. to the U.S.S.R. via the INTELSAT system. Only 1.5 half-channel hours of video programming were received in the U.S. from Poland, and no video programming was transmitted from the U.S. to Poland between the first quarter of 1988 and the first quarter of 1989.

23. In light of these circumstances, we believe that the public interest requires a grant of the applications subject to the conditions suggested by the State Department on behalf of the Executive Branch. As noted by the applicants, unprecedented events in the Soviet Union and Eastern Europe have increased the demand for coverage and have resulted in increased demand for INTELSAT space segment and INTELSAT-compatible ground station facilities. It also appears that in the face of this increased demand for such news coverage, INTELSAT has limited space segment facilities capable of satisfying these requirements. Moreover, the proposed use of Intersputnik facilities would not have any adverse impact on INTELSAT's economic viability. At its meeting held October 2-5, 1989, the INTELSAT Assembly of Parties decided, pursuant to Article XIV(d) of the INTELSAT Agreement, that use of Intersputnik space segment to provide the services proposed in the subject applications would not cause significant economic harm to the INTELSAT global system and would be technically compatible with existing and planned INTELSAT space segment.[23]

Ordering Clauses

24. Accordingly, IT IS ORDERED, that the applications of IDB Communications Group, Inc., File Nos. I-T-C-89-100, CSG-89-115-ML and CSG-89-116-ML; Cable News Network, Inc., File No. CSG-90-071-P/ML-(A); and Washington International Teleport, Inc., File No. I-T-C-89-142, ARE GRANTED subject to the conditions set forth below, and:

(a) IDB is authorized pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. §214, to establish channels of communication between existing and future earth stations owned, operated or leased by IDB and the Intersputnik satellite system for the transmission and reception of occasional use video and program audio services between the U.S. and the Soviet Union and other Eastern European countries;[24] IDB's licenses to operate its two 15.2 meter, 4/6 GHz international earth stations at Staten Island, New York are hereby modified pursuant to Title III of the Communications Act of 1934, as amended, 47 U.S.C. §301 *et seq.*, to add the Soviet Intersputnik satellite system (Statsionar 4) as a point of communication and to add SCPC audio services to all points of communication;

(b) CNN's license to operate its earth station at Atlanta, Georgia (E900466) is hereby modified pursuant to Title III of the Communications Act of 1934, as amended, 47 U.S.C. §301 *et seq.*, to use the Ghorizont 4 and 7 satellites (Statsionar 11) and Ghorizont 12 satellite (Statsionar 4) as points of communication for the reception of Soviet television programming including those from Syria and to permit the reception of occasional television news feeds from Statsionars 4 and 11; and

(c) WIT is authorized pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. §214, to establish channels of communication between existing and future earth stations owned, operated or leased by WIT and the Intersputnik satellite system for the transmission and reception of occasional use video and program audio services between the U.S. and the Soviet Union and other Eastern European countries not members of Intelsat[25];

25. IT IS FURTHER ORDERED that the authority granted herein is specifically conditioned on operation with the Intersputnik satellite system in accordance with the parameters summarized and the conditions imposed in AP-15-45E (Report of the Board of Governors to the Fifteenth Assembly of Parties Pursuant to Article XIV(d) Concerning the Use of the Intersputnik System by the United States, September, 1989).

26. IT IS FURTHER ORDERED that the Commission will retain jurisdiction over the operation of the facilities authorized herein with the Intersputnik satellite system to ensure compliance with the restrictions stated above in paragraph 25.

27. IT IS FURTHER ORDERED that the previous conditions, initially imposed on CNN's license for its facility at Ellenwood, Georgia and subsequently transferred to its Atlanta, Georgia facility, concerning the reception of programming from the Intersputnik satellite system ARE HEREBY SUPERSEDED.[26]

28. IT IS FURTHER ORDERED that each applicant shall submit monthly reports detailing the number of half-channel hours of television and audio programming carried over the Intersputnik satellite system to each country. The reports shall also set forth each carrier's number of half-channel hours of similar programming carried over each non-Intersputnik satellite system for the same countries served by the Intersputnik satellite system. These reports shall be filed no later than the 20th day of each month and shall include the required information for the previous month.

29. All license modifications issued herein shall be subject to modification or revocation by the Commission upon notice to the applicant based on a determination by the Secretary of State that continued operation of the subject facilities is no longer consistent with U.S. foreign policy and the national interest.

30. This authorization is granted upon condition that the applicants and licensees shall not operate under or enter into any contract, arrangement, or understanding with any foreign carrier or administration, which might prevent or hamper the establishment or unrestricted operation by such foreign carrier or administration of circuits with any other United States carrier.

31. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Gerald Vaughan
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] For the purposes of this application we will define Eastern Europe as those countries that were not members of INTELSAT at the time the instant application was filed. Those countries are Bulgaria, Romania, Albania, Czechoslovakia, Poland and East Germany. In light of the significant changes in the Soviet Union and Eastern Europe, we will construe the scope of this order to cover those countries listed above or their successors.

[2] Cable News Network, Inc., Mimeo No. 4569 (Com. Car. Bur. May 16, 1985). CNN notes that Ghorizont satellites are identified both by a Statsionar number, which corresponds to an orbital location, and a Ghorizont number, which corresponds to a satellite. Ghorizont numbers at a Statsionar may change as satellites are relocated or replaced, but Statsionar numbers do not change.

[3] Cable News Network, Inc., Mimeo No. 0968 (Com. Car. Bur. November 19, 1985). CNN's initial authorization to communicate with the Intersputnik system involved service from its Ellenwood, Georgia earth station (Call Sign E8633). CNN filed to modify the Ellenwood, Georgia earth station to add the Ghorizont 4 and 7 satellites as points of communication (File No. CSG-89-094-ML). CNN has since discontinued service via its Ellenwood, Georgia earth station and filed the subject application in order to substitute its Atlanta, Georgia earth station to provide the services previously authorized via the Intersputnik system, and to add additional points of communication in the Intersputnik system. Application File No. CSG-89-094-ML has been withdrawn and the license for Call Sign E8633 has been surrendered.

[4] On October 16, 1991 CNN filed an amendment to its application (File No. CSG-90-071-P/ML) to add Syria to the list of countries from which it seeks to receive occasional television newsfeeds that are transmitted via the Ghorizont 12, 4, and 7 satellites.

[5] In the case of newsfeeds from Syria, CNN states that use of INTELSAT facilities would involve a "triple hop" which is highly impractical.

[6] IDB's application requests authority to add Intersputnik satellites at 14^{0}W.L. (Statsionar 4) as points of communication. In addition, IDB requests to add SCPC audio services to its authorizations for its two 15.2 meter Staten Island, New York earth stations for all points of communications, including those points accessed through the INTELSAT system. Currently, IDB is authorized to provide INTELSAT Business Services (IBS) and television services through these stations via the INTELSAT system.

[7] Comsat proposes an exception to the one week advance notice requirement in the case of late-breaking news events.

[8] Additionally, Congress has declared it to be U.S. policy "to make available to consumers a variety of communications satellite services utilizing space segment facilities of INTELSAT and any additional such facilities which are found to be in the national interest" and which are technically compatible with and avoid significant economic harm to the INTELSAT system. Public Law 99-93, 99 Stat. 425, Sec. 146, August 16, 1985.

[9] *See* Letter from Under Secretary of State James L. Buckley, Department of State, to Mark Fowler, Chairman, Federal Communications Commission (July 23, 1981); Letter from George P. Shultz, Secretary of State, and Malcolm Baldridge, Secretary of Commerce, to Mark S. Fowler, Chairman, Federal Communications Commission (November 28, 1984).

[10] *Id. See also* Transborder Satellite Video Services, 88 FCC 2d 258 (1981); Establishment of Satellite Systems Providing International Communications, 101 FCC 2d 1046 (1985), Separate Systems Reconsideration, 51 Fed. Reg. 17631 (May 14, 1986) (summary only), FCC 86-144 (released April 17, 1986). Second Separate Systems Reconsideration, FCC 86-471 (released November 5, 1986).

[11] Letter from Randolph C. Earnest, Director, Office of Satellite and Cable Policy, Department of State to James L. Ball, Deputy Assistant Bureau Chief, International, Common Carrier Bureau (August 29, 1989); Letter from Kenneth W. Bleakley, Senior Deputy U.S. Coordinator and Director, Bureau of International Communications and Information Policy, Department of State to Wendell Harris, Assistant Bureau Chief--International, Common Carrier Bureau, Federal Communications Commission (September 10, 1991).

[12] According to the State Department in its August 29, 1989 letter, the forty-eight hour advance notification requirement for the provision of television and audio via Intersputnik was intended as a monitoring mechanism " . . . to ensure that it is used . . . only in instances where INTELSAT space or earth segment facilities are unavailable or inadequate."

[13] According to the State Department, this requirement need not apply to reception in the United States of services carried over the Intersputnik system for primary distribution in the Soviet Union and Eastern Europe.

[14] Letter from Ambassador Holmes, Department of State to Alfred Sikes, Chairman, Federal Communications Commission (November 21, 1990).

[15] Letter from Kenneth W. Bleakley, Senior Deputy U.S. Coordinator and Director, Bureau of International Communications and Information Policy, Department of State to Wendell Harris, Assistant Bureau Chief--International, Common Carrier Bureau, Federal Communications Commission (September 10, 1991).

[16] Cable News Network, Inc., Mimeo No. 4569 (released May 16, 1985), para. 9.

[17] *See* INTELSAT Board of Governors Summary Record of the Sixty-Second Meeting, BG-62-3E Final, W/3/85 (March 21-27, 1985), para. 96.

[18] Letter from Diana Lady Dougan, U.S. Coordinator and Director of International Communications and Information Policy, Department of State to Mark S. Fowler, Chairman, Federal Communications Commission (November 7, 1985).

[19] Letters from George S. Li, Chief, International Facilities Division, Common Carrier Bureau, Federal Communications Commission to Robert S. Koppel, Attorney for IDB Communications Group, Inc. (June 15, 1989); and Letter from George S. Li, Chief, International Facilities Division, Common Carrier Bureau, Federal Communications Commission to Harold Narus, CICI, Inc. (July 6, 1989).

[20] Communications Satellite Corporation, 5 FCC Rcd 5952 (1990).

[21] *Id. at 5953.*

[22] CNN notes that it does not have an earth station in Atlanta pointed at the 335.5-SE satellite and would have to "double hop" transmissions from Dubna to Etam, West Virginia, and from there to its headquarters in Atlanta.

[23] *See* AP-15-45E (Report of the Board of Governors to the Fifteenth Assembly of Parties Pursuant to Article XIV(d) Concerning the Use of the Intersputnik System by the United States, September, 1989).

[24] The blanket Section 214 authorizations for IDB and WIT to establish channels of communications between existing and future earth stations and the Intersputnik system should not be construed as granting blanket authority under Title III of the Communications Act for such earth stations to communicate with the Intersputnik system. Therefore, their use of earth stations to communicate with the Intersputnik system is contingent upon each station having received the requisite authority under Title III of the Communications Act to communicate with the Intersputnik system.

[25] *Id.*

[26] *See supra* para. 18.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-512

In the Matter of	
Amendment of Section 73.202(b)	RM-5563
Table of Allotments,	RM-5862
FM Broadcast Stations.	
(Monterey, Tennessee and	
Monticello, Kentucky)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: February 6, 1992; Released: February 25, 1992

By the Commission:

1. Before the Commission is the Application For Review filed by Cumberland Plateau Broadcasting, Inc. ("Cumberland"), of the *Report and Order*, 2 FCC Rcd 6627 (All. Br. 1987) (*"Order"*), in this proceeding. Cumberland, formerly the licensee of Stations WAEW-AM and WXVL-FM, Crossland, Tennessee,[1] opposes the decision in the *Order* to grant the request of First Media of Monterey, Inc. ("First Media"), permittee of Station WRJT-FM, Monterey, Tennessee, to substitute Channel 295C2 for Channel 295A at Monterey and modify First Media's construction permit accordingly.[2] First Media filed an Opposition to Cumberland's Application for Review, and Cumberland filed a Reply.

2. *Background.* Cumberland initially filed an opposition to First Media's upgrade proposal in response to the *Notice of Proposed Rule Making*, 2 FCC Rcd 535 (All. Br. 1987)(*"Notice"*), which sought comment on First Media's request. Cumberland alleged that the upgrade would cause unwarranted competitive injury to its Crossland stations by placing the stations at a competitive disadvantage and by precluding Cumberland from improving its FM station. Cumberland also alleged that First Media had committed four acts of misconduct in violation of the Commission's Rules and of the Communications Act of 1934, as amended. Specifically, Cumberland asserted that the original construction permit granted to First Media for Station WRJT-FM was issued in a false name wrongfully given by one of First Media's principals; that the permit was assigned to First Media, Inc., even though that entity had not come into existence as a valid corporation; that, in violation of Section 310 of the Communications Act of 1934, as amended, an unauthorized transfer of control had taken place from the permittee to a minority shareholder in First Media; and that a minority shareholder had represented himself to a prospective buyer as the owner of WRJT-FM and had offered to sell that station for $400,000 if the proposed upgrade was not approved and for $500,000 if the upgrade was approved.

3. In the *Order*, the Chief, Policy and Rules Division, Mass Media Bureau, denied Cumberland's opposition. With respect to the allegation that the proposed upgrade would cause economic harm to Cumberland, the Division cited *Revision of FM Channel Policies and Procedures*, 90 F.C.C. 2d 88 (1982), which stated that potential economic injury is not a valid argument against a station's desire to provide wide coverage service to the public. The Division also found that resolution of the misconduct allegations was "beyond the scope of [the] rule making proceeding and irrelevant to the upgrade" proposal. The Division stated that Cumberland's allegations of wrongdoing "are more appropriately raised outside the rule making process". *See* 2 FCC Rcd at 6627.

4. *Application for Review.* Cumberland restates the four misconduct allegations raised in its opposition to the *Notice* and argues that when a licensee has violated the Communications Act, the character and fitness of the licensee's principals are called into question and the Commission may not properly ignore such violations in deciding whether or not to upgrade that licensee's facility. Cumberland adds to its original allegations by characterizing the conduct of the minority shareholder as an attempt to use the upgrade to obtain unjust enrichment. Cumberland states that the minority stockholder never became the licensee and therefore was not the proper party to benefit from the sale of Station WRJT-FM. Cumberland argues that the minority shareholder's actions violated "basic provisions of the Communications Act",[3] and therefore the shareholder should not be permitted to profit from the sale of Station WRJT-FM.[4] First Media filed an opposition rebutting the allegations and Cumberland filed a reply.[5]

5. *Audio Services Division Action.* Several months after Cumberland filed its Application for Review, First Media filed an Application for Transfer of Control of Station WRJT-FM to the minority shareholder.[6] Cumberland filed a Petition To Deny the application for transfer of control. In that Petition, Cumberland reiterated the allegations it made in this proceeding. The Audio Services Division denied Cumberland's Petition and granted First Media's Application For Transfer Of Control. In a letter dated April 22, 1989, the Chief, Audio Services Division, stated that Cumberland failed to raise a substantial and material question of fact regarding the allegations of misconduct on First Media's part. The Audio Services Division determined that it did not appear that the original permittee acted to mislead the Commission by filing under a false

[1] 1 On September 26, 1988, the Commission authorized a transfer of control of Stations WAEW-AM and WXVL-FM from Cumberland to Crossville Radio, Inc., of Crossville, Tennessee. None of the officers or shareholders of Crossville was a principal or shareholder in Cumberland.

[2] We note that since the filing of the Application for Review, First Media filed an application, and has received a construction permit (BPH-880309IB), to operate Station WRJT-FM on Channel 295C3 in lieu of Channel 295C2.

[3] However Cumberland does not specify which sections of the Communications Act the minority shareholder is alleged to have violated.

[4] We note that Cumberland did not dispute the *Order's* resolution of the economic injury issue.

[5] Given our disposition of Cumberland's Application for Review, we need not summarize these pleadings.

[6] *See* File No. BTCH-880114GQ.

name. The licensee's failure to renew and to timely pay the state fee necessary to maintain its corporate status was not considered significant. With respect to the allegation that control of First Media was transferred without authorization, the Audio Services Division concluded that, in light of First Media's explanation that certain agreements drafted in 1985 and 1986 to transfer control of First Media to a minority shareholder were never consummated by issuance of stock, no further inquiry in the context of an evidentiary hearing was required. Finally, the Audio Services Division found that it was not unusual or improper for the minority shareholder to be aware of the value of the station and the upgrade proceeding and to discuss a sale of Station WRJT-FM with a prospective purchaser. Accordingly, the Audio Services Division granted the application to transfer control of First Media and denied Cumberland's Petition to Deny that application.[7] Cumberland did not seek review of the decision.

6. *Discussion.* We will deny the Application for Review. We affirm the Division's decision that issues concerning licensee or permittee misconduct occurring outside the context of the allotment proceeding are irrelevant to the determination concerning the action to be taken in such a proceeding, and are more appropriately raised outside of the rule making process. If a party wishes to raise misconduct allegations addressed to a party participating in an allotment rule making, it may do so, as Cumberland did, in a Petition to Deny an application to transfer control of a licensee or through other appropriate means, *e.g.*, the filing of a complaint, a motion to revoke the station's license, or an objection to an application. In this instance, Cumberland's misconduct allegations regarding First Media's character and fitness as a licensee were raised in an appropriate context and were fully addressed there. That resolution of the misconduct allegations is now final.

7. In view of the foregoing, IT IS ORDERED, that the Application For Review filed by Cumberland Plateau Broadcasting Company, Inc., IS DENIED.

8. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

9. For further information about this proceeding, contact Belford V. Lawson, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[7] *See* Letter from Chief, Audio Services Division, Mass Media Bureau, to Christopher J. Reynolds, counsel to First Media (April 26, 1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 91-294

In the Matter of

Amendment of Part 80 of the
Commission's Rules concerning the
use of synthesized voice for
distress communications
on VHF marine channel 16

REPORT AND ORDER

Adopted: February 13, 1992; Released: February 26, 1992

By the Commission:

I. INTRODUCTION

1. This Report and Order amends the Maritime Services Rules (47 C.F.R. Part 80) to permit the use of synthesized voice technology for distress transmissions on VHF, MF, and HF marine distress frequencies.

II. BACKGROUND

2. On September 28, 1990, Mr. Robert Tendler filed a Request for an Issuance of Declaratory Ruling, asking the Commission to interpret Part 80 of the Commission's Rules to permit the use of automated synthesized voice on VHF marine channel 16 during distress transmissions.[1] We put this matter on Public Notice on October 24, 1990, 55 Fed. Reg. 45,625 (1990). The Radio Technical Commission for Maritime Services (RTCM) responded to the public notice with timely comments.[2] RTCM objected to the issuance of a declaratory ruling stating that any change in the rules that has the potential of affecting safety of life at sea should be adopted only after adequate opportunity for public review and comment in the procedural form of a Notice of Inquiry or Notice of Proposed Rule Making.[3]

3. We agreed with RTCM and adopted the *Notice of Proposed Rule Making*, 6 FCC Rcd 2d 5994 (1991) (*Notice*), in this proceeding to develop a public record on the issues involved with the use of synthesized voice for distress communications on marine distress channels. We took this position in the interest of preserving a primary purpose of Part 80 of the Commission's Rules -- to provide for the safety of life and property at sea. Because safety is of paramount concern, we have tried to ensure that radio transmitters licensed under Part 80 operate effectively for the maritime community and national and international search and rescue teams.

III. DISCUSSION

4. In the *Notice* we proposed specific rules related to the number of repetitions, length and content of a synthesized voice message. Additionally, we specified that the use of synthesized voice technology can not exceed the existing technical standards such as emission and bandwidth limitations for ship transmitters. We requested specific comments on the possible safety effects of permitting synthesized voice distress messages on frequencies reserved for distress and safety communications. Further, we invited comments on whether synthesized voice should be permitted on other marine channels. Comments were filed by Tendler Technologies, Inc. (Tendler); Boat Owners Association of the U.S. (Boat US); Hull Electronics (Hull); Acheson Charters, Ltd. (Acheson); and Lake Carriers' Association (Lake Carriers). Tendler filed Reply Comments.

5. All commenters support permitting the use of synthesized voice for distress communications to improve marine safety. Similar to the other commenters, Boat US supports improvements in the transmission of distress calls through the use of a new type of technology that has the potential to save lives.[4] Several commenters agree with the proposal in the *Notice* that the use of synthesized voice distress messages should guard against excessive repetition, unreasonable length of messages, and inadvertent activation.[5] Two of the commenters (Tendler and Hull) suggest that the use of synthesized voice for distress messages should be permitted on medium frequency (MF) and high frequency (HF) distress frequencies, in addition to marine VHF channel 16.[6] In suggesting this approach, Hull states: "We believe use of such a system in the MF and HF bands would save untold lives and property under circumstances where VHF would be ineffective because of its range limitations."[7]

6. Tendler, however, objects to the provision in the *Notice* that requires the statement "this is a recording" prior to each transmission. Tendler asserts that by requiring such a warning, those hearing the transmission are likely to pay less attention, and that the four word statement is unnecessarily lengthy. In addition, Tendler requests that we amend the provision in the *Notice* that

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[1] The United States Coast Guard (USCG) maintains an aural watch on channel 16 and responds to distress calls made on this channel. Ships equipped with VHF stations in compliance with the Communications Act of 1934, as amended, 47 U.S.C. Title III, the International Convention for the Safety of Life at Sea, 1974, T.I.A.S. 9700, or the Agreement Between the United States of America and Canada for the Promotion of Safety on the Great Lakes by Means of Radio, T.I.A.S. 7837, amended T.I.A.S. 9352, are required to maintain a watch on channel 16 when the station is not being used for other traffic. Additionally, ship stations voluntarily equipped with a VHF station are required to maintain a watch on channel 16 when the station is operating and not being used for other traffic.

[2] The RTCM is a nonprofit organization that studies maritime issues. It is comprised of marine electronics manufacturers, government organizations, such as the U.S. Coast Guard, as well as other parties interested in maritime operations.

[3] RTCM comments at 2.

[4] Boat US comments at 1.

[5] *See* comments filed by Acheson at 1, Lake Carriers at 1, Tendler at 2, and Hull at 1.

[6] Hull comments at 2-3; Tendler comments at 2.

[7] Hull comments at 2-3.

would require any synthesized voice device to be interruptible at any time.[8] Tendler also suggests that we increase the length of time permitted for the entire distress message from 30 to 45 seconds.

7. We agree with the commenters that allowing the use of synthesized voice to generate distress messages on maritime channels allotted for distress and safety communications, including those in the MF and HF bands, has the capability to enhance maritime safety. Further, the U.S. Coast Guard believes such use could have benefits for mariners in distress.[9] Accordingly, we are amending the rules to permit synthesized voice transmissions on marine distress frequencies. With respect to Tendler's objection to requiring the statement "this is a recording," we believe that it is important to inform those hearing a synthesized voice message that the message is recorded. This limits futile attempts to communicate with the synthesized message by those seeking to provide assistance. Additionally, this provision is consistent with the current policies regarding the use of synthesized voice technologies in other types of equipment.[10] Therefore, we will continue to require the warning as proposed in the *Notice*. Tendler's objection to the requirement that the automated synthesized voice transmission be capable of being overridden by a radio operator is unpersuasive. Safe and efficient operations in the maritime radio service require that the radio operator have absolute control of the radio equipment. In the marine environment, it is critical that the radio operator be able to transmit or receive messages as the situation demands.[11] Finally, we are increasing the permissible length of the message from 30 to 45 seconds as suggested by Tendler. This will allow a synthesized message to convey more information without blocking the frequency.

8. In summary, we are amending the rules to permit the use of synthesized voice on MF, HF and VHF marine distress frequencies to transmit radiotelephone distress messages. We are permitting the use of external add-on devices to generate the synthesized voice message. The synthesized voice transmission may not exceed the existing technical standards such as emission and bandwidth limitations for ship station transmitters. Additionally, we are limiting the number of repetitions and content of a synthesized voice message, substantially as proposed.

IV. ORDERING CLAUSE

9. Accordingly, IT IS ORDERED that pursuant to the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), Part 80 of the Commission's Rules, 47 C.F.R. Part 80, IS AMENDED as set forth in the Appendix below.

10. IT IS FURTHER ORDERED that this Report and Order will be effective thirty days after publication in the Federal Register.

11. FCC contact: Susan Jones, Aviation and Marine Branch, Private Radio Bureau, (202) 632-7175.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Final Rule

Part 80 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

Part 80 - STATIONS IN THE MARITIME SERVICES.

1. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301, 609; 3 UST 3450, 3 UST 4726, 12 UST 2377.

2. Section 80.203 is amended by adding a new paragraph (m) to read as follows:

§ 80.203 Authorization of transmitters for licensing.

* * * * *

(m) Ship station MF, HF, and VHF transmitters may employ external or internal devices to send synthesized voice transmissions for distress and safety purposes on any distress and safety frequency authorized for radiotelephony listed in § 80.369 provided the following requirements are met:

(1) The technical characteristics of the distress transmissions must comply with this part.

(2) A transmitter and any internal device capable of transmitting a synthesized voice message must be type accepted as an integral unit.

(3) The synthesized voice distress transmission must begin with the words "this is a recording" and should be comprised of at least:

(i) The radiotelephone distress call as described in § 80.315(b) and the ship's position as described in § 80.316(c); or

(ii) The radiotelephone distress message as described in § 80.316(b). If available, the ship's position should be reported as described in § 80.316(c);

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[8] Tendler comments at 2.

[9] *See* letter from D.R. Freezer, Captain, U.S. Coast Guard, Chief, Search and Rescue Division addressed to Mr. Gene A. Bechtel, attorney for Mr. Tendler (August 3, 1990).

[10] This requirement will conform to the Commission's Rules regarding synthesized transmissions on Emergency Position Indicating Radiobeacons, as well as Emergency Locating Transmitters. *See* Sections 80.1053(a)(5) and 87.141(h) of the Commission's Rules, 47 C.F.R. §§ 80.1053(a)(5) and 87.141(h).

[11] For example, *see* Section 80.80(c) of the Commission's Rules, 47 C.F.R. § 80.80(c).

(4) Such transmission must be initiated manually by an on-off switch that is protected from inadvertent activation and must cause the transmitter to switch to an appropriate distress and safety frequency. The radiotelephone distress call and message described in §§ 80.203(m)(3)(i) and (ii), respectively, may be repeated. However, the entire transmission including repeats must not exceed 45 seconds from beginning to end. Upon ending the transceiver must return to the receive mode and must not be capable of sending the synthesized distress call for at least thirty seconds. Placing the switch to the off position must stop the distress transmission and permit the transmitter to be used to send and receive standard voice communications.

(5) Use of the microphone must cause the synthesized voice distress transmission to cease and allow the immediate use of the transmitter for sending and receiving standard voice communications.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-357

In re Applications of

PALMETTO COMMUNICATIONS COMPANY
WDIX,
Yadkinville, North Carolina

File No. BP-870331BK

For a Construction Permit for a Modification of Facilities

TRIAD NETWORK, INC.
Greensboro, North Carolina

File No. BP-870928AA

For a Construction Permit for a New AM Station

Appearances

Peter Gutmann on behalf of Palmetto Communications Company; *William D. Silva* and *Donald E. Johnson* on behalf of Triad Network, Inc.; *Gary S. Smithwick* and *Lisa Thornton* on behalf of Robert Carroll Rickenbacker; and *Larry A. Miller* on behalf of Chief, Mass Media Bureau.

SUPPLEMENTAL INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

Issued: February 14, 1992; Released: February 27, 1992

1. On April 15, 1991, the Review Board remanded this case for a further hearing and supplemental decision on the following issues (*Memorandum Opinion and Order*, 6 FCC Rcd 2193, 2195 (Rev. Bd. 1991)):

> 1. To determine whether Palmetto Communications Company was lacking in candor and/or misrepresented facts respecting its ownership structure and, if so, the effect of such conduct upon its basic qualifications to be a Commission licensee.
>
> 2. To determine whether Palmetto Communications Company violated Section 1.65 of the Commission's Rules by failing to report major changes in its ownership structure, and if so, whether it is qualified to be a Commission licensee.

2. Exhibits were exchanged on August 6, 1991 and additional hearing sessions were held on August 27, 1991 (Tr. 231-458) and August 28, 1991. Tr. 459-621. The record was closed on August 28, 1991. *Order*, FCC 91M-2686, released September 3, 1991. Proposed findings were filed by all parties on October 4, 1991 and replies were filed by all parties on October 18, 1991.

FINDINGS OF FACT

Formation of an agreement between William B. Hallman and Robert Rickenbacker

3. In the late spring or early summer of 1989, Rickenbacker called Hallman about some advertising for Rickenbacker's newspaper, the "Holly Hill Observer," and he mentioned that there was a radio station for sale in Yadkinville, North Carolina. Tr. 453; Palmetto Exh. 4, at 1. They then went to Sylva, North Carolina to talk to James Childress, owner of the station, and to Yadkinville to see the station. Tr. 453, 456; Palmetto Exh. 4, at 1. During that trip they discussed owning the station together, as partners, on an equal basis. Tr. 456. They agreed that each would contribute $25,000, Hallman said. Palmetto Exh. 4, at 3. Hallman also stated that they tentatively agreed that Rickenbacker would perform needed engineering and repairs for the station and that Hallman would run the station along with his spouse, Terry, who would assist him with bookkeeping and financial matters. *Id.*

4. They talked with Walter Cockerham, a principal of Triad, about lending them money to purchase the Yadkinville station. Cockerham said he would lend them $100,000 if they would dismiss the application at issue in this proceeding to upgrade the Yadkinville facility. Rickenbacker believed that dismissing the application in exchange for the loan was a good idea because the cost of upgrading the facility would not justify the small increase in power. Tr. 578; Bureau Exh. 4. Hallman did not want to accept Cockerham's offer; he wanted to finance the station with James Childress, who was then the owner of the Yadkinville station, WYDK-AM. Tr. 544. Hallman's view prevailed on financing. *Id.* Rickenbacker said that after Hallman made that decision, Hallman continued to make all other important decisions about the partnership. *Id.*

5. On August 23, 1989, Hallman and Rickenbacker signed a sales agreement to purchase the Yadkinville radio station from Childress. Tr. 463-64; Palmetto Exh. 4, at 16-40. The Sales Agreement stated they would own the station equally, either as individuals or in a corporation. *Id.* Hallman paid the $15,000 downpayment. Tr. 47. Because Rickenbacker could not contribute, Hallman said that he and Rickenbacker would work out a method of repayment at a later time. Tr. 473-74. Rickenbacker always assumed, however, that he would be obligated for 50 percent of money needed to purchase the station. Tr. 478.

6. On August 29, 1989, Palmetto's application for assignment of the Yadkinville license was filed at the Commission. Hallman signed the application on August 24, 1989. Palmetto Exh. 4, at 12-15; Tr. 251. It was represented in the application that Palmetto was a partnership and that Hallman and Rickenbacker owned equal shares. Palmetto Exh. 4, at 15. Palmetto's August 24, 1989 request to the Commission for the call letters WDIX listed Hallman as president and Rickenbacker as chief engineer and vice president. Bureau Exh. 3. The letter, which was signed by both Hallman and Rickenbacker, stated in the

text that the station was owned by Palmetto Communications Corporation. *Id.* The letterhead also called Palmetto a corporation. *Id.*

7. After the sales agreement was signed, Hallman became concerned about Rickenbacker's failure to perform the engineering tasks needed to get the station back on the air. Palmetto Exh. 4, at 5. On October 6, 1989, Hallman wrote to Rickenbacker about station expenses and asked him to promise in writing that he intended to meet his obligations. Palmetto Exh. 4, at 41. Hallman suggested to Rickenbacker that if he was unable to participate, they should look for another partner. *Id.* Rickenbacker sent Hallman a check for $250 on October 6, 1989. *Id.*, at 42. Rickenbacker also sent Hallman $500 and contributed some spare parts for the station. Tr. 256-58, 475. That is all he has contributed. Hallman has contributed about $40,000. Tr. 424.

Closing on purchase of WDIX

8. Hallman, Rickenbacker, Childress, and Childress' spouse met at the law offices of Richard Randleman on November 6, 1989. Tr. 258. Hallman and Rickenbacker signed a promissory note to pay Childress $110,000 for the station. Palmetto Exh. 4, at 43. A Bill of Sale conveyed the station property to Hallman and Rickenbacker. Palmetto Exh. 4, at 50. There was a deed of trust signed by Hallman and Rickenbacker, a warranty deed conveying the real estate to Hallman and Rickenbacker, and an assignment of the station license to Hallman and Rickenbacker. Palmetto Exh. 4, at 43-52. When the closing took place, Rickenbacker was having second thoughts but he still intended to own the station with Hallman. Tr. 511-12.

9. At the time of closing, Rickenbacker was asked by Hallman to agree to pay $25,000 for his interest. Triad Exh. 4. The agreement presented by Hallman to Rickenbacker provided that Rickenbacker would pay the $25,000 in $5,000 monthly contributions beginning November 30, 1989 and each payment would give Rickenbacker 8.5 shares. *Id.* When the full amount was contributed, Rickenbacker would have 49 shares. *Id.* If Rickenbacker did not make the payments on schedule, Hallman's agreement provided that Rickenbacker's right to stock would be cancelled. *Id.* Hallman claims he was trying to "motivate" Rickenbacker to participate as a partner. Tr. 259-60. This was the first time Hallman had mentioned a schedule of payments to Rickenbacker. Tr. 482-83. Rickenbacker signed the agreement with Hallman on November 6, 1989 but in his mind he saw it as a way of extricating himself from the partnership. Tr. 511-12. He believed that if he did not make the payments, he would not be a partner in Palmetto. *Id.*

10. The agreement, which Rickenbacker and Hallman signed, provided that the shares Rickenbacker would receive would be in a corporation. Triad Exh. 14. Hallman said the intention was that Rickenbacker would acquire 49 percent in the corporation which would own the Yadkinville station and two other stations. Tr. 269-75. With regard to the first payment the agreement is as follows: "Mr. Rickenbacker will acquire 15 shares in WDIX-AM 1480 Radio and Palmetto Communications Corporation...." When Hallman was asked to explain the preceding sentence, which appears to give Rickenbacker an interest in the Yadkinville station only if he made the payments, he said he thought it was a typo. Tr. 384. When asked how it could be a typo since he said he dictated the agreement to a secretary in attorney Randleman's office on the day of the closing (Tr. 270, 373), he said he thought the person who typed it "just did not understand it." Tr. 384-85. He was then asked how something that was dictated could not be understood and he then said that he "talked about it" and told the typist to "put this into some kind of agreement." Tr. 385. Ms. Hallman's testimony conflicts with Mr. Hallman's on this point. She said she typed the agreement from a handwritten draft prepared by Mr. Hallman a day or two before the closing. Tr. 393-94. Hallman claims that if Rickenbacker had made the payments, the money would have been used only for WDIX, Yadkinville (Tr. 275) but it was being paid for his corporate interest, not his partnership interest. Ms. Hallman said she thought the purpose of the agreement was to provide money for the purchase of the Yadkinville station. Tr. 395-96. Mr. Hallman said he did not understand the agreement. Hallman said the agreement was about Rickenbacker obtaining stock in the corporation, not about becoming a partner in the Yadkinville station. Tr. 343. But it was to get Rickenbacker to participate (Tr. 344) and, if he did, he would be "buying into...the radio station." Tr. 345. Hallman was asked how that could be if Rickenbacker was buying stock in the corporation since the corporation did not own the radio station and he responded that he did not understand it either. Tr. 345. Hallman said it was too soon to tell if the corporation would acquire WDIX. Tr. 275. When asked to explain the relationship between requiring Rickenbacker to make payments for stock in a corporation for a 49 percent interest and the equal share he purportedly had in the partnership, Hallman was unable to reconcile the agreement's provision that Rickenbacker would not own an interest in the Yadkinville station unless he made the $25,000 in payments. Tr. 275-76.

11. Rickenbacker said that he and Hallman had discussed forming a corporation that would own stations, but as far as he knew no corporation had been established. Tr. 457-58. He thought the agreement presented by Hallman at the closing had to do with his partnership interest. Tr. 483. He assumed that if he paid the amount provided in the agreement he would be a partner and if he did not, he would not. Tr. 483. The press release announcing the purchase of WDIX was issued by "Palmetto Communications, Inc." Palmetto Exh. 4, at 53.

Operation of WDIX

12. During November 1989, Rickenbacker helped the station to begin broadcasting. Palmetto Exh. 4, at 7; Tr. 288, 472, 488, 552. Hallman found that Rickenbacker's performance was not good and that he was unavailable. Palmetto Exh. 4, at 7-8. Because of this, by December 1989, Hallman stopped consulting Rickenbacker about the station. Tr. 292. When Rickenbacker did not make the payments he was obligated to make under the agreement, Hallman did not ask for the money; he assumed that if Rickenbacker had the money he would make them. Tr. 337, 346-48, 483. In the first week of December 1989, Rickenbacker went to Yadkinville for the Christmas parade. At that time, Hallman asked him whether he was going to make the payment that was past due and Rickenbacker told him he was not and that he was not going to be a partner. Bureau Exh. 4, at 1; Tr. 489-91. Rickenbacker has not been back to Yadkinville since the Christmas parade. Tr. 492.

13. A month or two after the Christmas parade, Hallman returned equipment that Rickenbacker had brought to WDIX. Tr. 402-03. He never again asked Rickenbacker about paying his share. Tr. 495. However, when Rickenbacker called to see how the station was doing he was told by Hallman that, because he had not contributed to the partnership, he was not an owner. Tr. 494, 512, 518, 522. Ms. Hallman also told Rickenbacker, he was not a partner. Tr. 495.

14. Hallman said that Rickenbacker never told him that he did not want to be a partner. Tr. 382. If he had, Hallman said that would have ended the partnership. Tr. 358. If Rickenbacker had told him he was not going to make the contributions called for in the agreement, that too would have ended the partnership. Tr. 359. In the beginning of 1990, although they continued to talk to one another, Hallman and Rickenbacker no longer spoke about WDIX. Tr. 295. Hallman then realized that Rickenbacker was not going to put any money into the partnership. Tr. 303. Hallman said Rickenbacker never inquired about the money due the former owner and he has not assisted in the legal costs for the proceeding. *Id.*

15. Palmetto Communications, Inc. was organized by Hallman on November 16, 1989. Triad Exh. 15; Tr. 282-83. The corporation has a bank account in Summerville, South Carolina, from which his spouse pays the bills for WDIX. Tr. 322-23. In addition, the corporation has a Yadkinville bank account in which WDIX deposits are made. Tr. 322. The Yadkinville deposits are then transferred to the Summerville account. Tr. 323-24. Ms. Hallman writes all checks and she represents that the two bank system was suggested by an accountant. Tr. 402-04. She also filed tax returns for the corporation in 1989. No partnership return was filed; the corporation claimed all operating losses from WDIX and Hallman, as the sole stockholder in what is a Subchapter S corporation, received all the tax benefits. Triad Exhs. 17, 18, and 19; Tr. 408-11. The Hallmans concede that because Palmetto Communications, Inc. is not the owner or operator of WDIX, the tax returns were not accurate. They claim their accountant told them to do it and they never actually reviewed the returns before filing them. Tr. 365-68, 355, 410-11, 439-40, 446-47. Despite the treatment of the station on the tax returns, when Ms. Hallman filed the WDIX ownership report with the Commission on July 30, 1990, Hallman and Rickenbacker were listed as partners in Palmetto Communications, Inc. Bureau Exh. 1; Tr. 418-20. Ms. Hallman said she incorrectly indicated that Rickenbacker was a partner with her spouse in the Palmetto corporation because everything she does at the station is done in the corporation's name. Tr. 420.

Other events

16. On January 15, 1991, Rickenbacker asked Triad's lawyer, Stephen Yelverton, who was counsel for Triad in this proceeding at the time, to represent him in applying for an FM facility in Bowman, South Carolina. Bureau Exh. 5, at 1-2. Yelverton said he would represent Rickenbacker but he would have to inform the Commission that he was no longer involved with Palmetto and WDIX because Hallman had not done so. *Id.* On February 27, 1991, the day Rickenbacker filed his Bowman application, he sent to the Commission a letter written by Yelverton, in which he said that he had "never had an ownership interest in WDIX-AM" and that he had "never consummated the assignment or obtained any ownership interest" in the station. Tr. 500-02, 516, 555; Bureau Exh. 2; Bureau Exh. 5, at 2-4. Rickenbacker maintains that, because he never paid any money (other than $750 he considered abandoned), he never acquired an interest in WDIX. Bureau Exh. 6, at 1; Tr. 503, 529-30, 534, 552. In a later affidavit, filed in support of a motion to disqualify Triad's counsel, Rickenbacker stated that he had been a partner in Palmetto from August 1989 to November 1989. Bureau Exh. 8, at 1; Tr. 531-33.

17. On May 17, 1991, the Bureau and Triad requested that Palmetto produce all documents relating to Rickenbacker's ownership interest in Palmetto. Palmetto did not produce the November 6, 1989 agreement between Hallman and Rickenbacker until August 23, 1991. Its existence did not become known until Hallman was deposed. Tr. 261. The Hallmans could not explain why it was not produced. Tr. 262-66, 398-401, 431-33. Counsel urges that since the agreement was signed on November 6, 1989, it was not responsive to the request which sought all documents about ownership since November 6, 1989. The Bureau and Triad also requested all documents filed with state and federal agencies which indicated control or ownership of Palmetto. Palmetto provided two pages of a federal tax return but waited until the day before the hearing to produce the remaining pages and the state tax returns. Tr. 436, 307.

18. On July 31, 1991, Hallman filed a complaint against Rickenbacker in the Court of Common Pleas in Orangeburg County, South Carolina, seeking to terminate the partnership. Palmetto Exh. 4, at 54-59. On September 4, 1990, Hallman signed a note to pay Palmetto's law firm a fee of $13,285.77 for this proceeding. Triad Exh. 16. On May 24, 1991, Hallman stopped broadcasting on WDIX when lightning struck the transmitter and the station has not resumed broadcasting because it would have cost $1500 to replace the part. Tr. 300, 375.

CONCLUSIONS

Palmetto Communications Company failed to notify the Commission that one of two partners no longer had an ownership interest in WDIX and both of the original owners, Rickenbacker and Hallman, withheld information and misrepresented facts about the ownership of WDIX before the Commission.

19. Throughout this proceeding, Rickenbacker and Hallman claimed that they were equal partners who would own and control WDIX on its existing frequency and the new frequency to be awarded here. There was no reason to doubt their representations, which were first made to the Commission on August 29, 1989, until Rickenbacker wrote to the Commission. On February 27, 1991, Rickenbacker told the Commission that he had never had an ownership interest in WDIX and that the assignment of WDIX was never consummated.

20. The record does not support Rickenbacker's claims that the sale was never consummated or that he was never an owner. But, the record does establish that he never exercised any control over WDIX and was only briefly treated as an owner. The evidence establishes that since late 1989, William Hallman has been in complete control and exercised all the rights of ownership over WDIX. Moreover, there is no evidence to support Palmetto's

claim during this proceeding that Hallman and Rickenbacker were equal partners who would jointly control the operation of WDIX.

21. On August 29, 1989, when Palmetto applied to the Commission to assign the license for the Yadkinville facility to Palmetto, it was represented in the application signed by Hallman that he and Rickenbacker owned equal shares. But from the outset, Palmetto provided the Commission with inconsistent information about its organization. On August 24, 1989, when Palmetto requested the call letters WDIX for the Yadkinville facility, both Hallman and Rickenbacker signed a letter which indicated that Palmetto was a corporation, with Hallman and Rickenbacker holding offices. But a few days later, on August 29, 1989, Palmetto represented on Form 314, in the section seeking information about the assignee's legal qualifications, that it was a partnership in which Hallman and Rickenbacker were equal partners. There was no written partnership agreement and no corporation had been organized.

22. Hallman and Rickenbacker were never equally in control of Palmetto's affairs. Rickenbacker said that after he and Hallman disagreed about the method of financing the purchase of the station, Hallman made all of the decisions about the station. Nevertheless, when Palmetto agreed in August 1989 to buy the Yadkinville station, they both signed the sale agreement. Hallman, however, provided the downpayment. In November 1989, when the assignment and sale took place, Rickenbacker was again listed on the various conveyance documents and the note to the former owner, Childress, as an owner. But by the closing date, November 6, 1989, Hallman and Rickenbacker knew their partnership relationship was in trouble. Hallman claims Rickenbacker had not done the engineering he promised at the station and had not contributed to the financial obligations of the partnership. In fact, in early October 1989, Hallman asked Rickenbacker to promise in writing that he would meet his obligations. If he was not going to fulfill his obligation, Hallman told Rickenbacker, they should look for another partner. Rickenbacker then sent Hallman two token payments totaling $750.

23. At the closing, Rickenbacker was required by Hallman to sign an agreement in which he promised to pay $25,000 in five installments. The first installment of $5,000 was due by November 30, 1989. But that agreement indicated that even if Rickenbacker made the payments he would have only a 49 percent interest, not the 50 percent interest represented to the Commission. Contrary to Rickenbacker's representation to the Commission that he was never an owner and that the assignment was not consummated, he was an owner and participated in the sale. He signed the sale documents. When Rickenbacker signed the documents at the closing on November 6, 1989, he had changed his mind about owning the station and he said that he never intended to make the $25,000 payment called for by his agreement with Hallman. He believed that if he let the payment dates pass without making his contributions under the agreement, he could extricate himself from the partnership.

24. The November 1989 agreement provides that Rickenbacker would have an interest only if he made timely payments to Hallman. Hallman argues that Rickenbacker's partnership status was not affected by the November 1989 agreement. He claims that the language in the agreement which conditioned Rickenbacker's interest on making the payments was an error by the person who typed the agreement. Hallman said he dictated the agreement to someone in his lawyer's office on the day of the closing. Ms. Hallman's testimony does not support Hallman's representation. She said that Hallman wrote out the agreement and she typed it a few days before the closing. Hallman offered no explanation about why he accepted the agreement if it did not express his actual intent. Ms. Hallman's understanding of the agreement was the same as Rickenbacker's: Rickenbacker needed to comply with the agreement to obtain an interest in the Yadkinville station.

25. It appears that Hallman at some point decided that the Yadkinville station would be owned by Palmetto Communications as a corporation. Frequently the documents in the record refer to Palmetto as a corporation. In August 1989, when Palmetto applied to the Commission for call letters, the letter from Palmetto gave every indication that Palmetto was a corporation, not a partnership. The agreement between Rickenbacker and Hallman, signed at the closing on November 6, 1989, referred to shares of ownership and even the press release announcing the purchase by Palmetto identified it as a corporation. By December 1989, Palmetto Communications, Inc. became the legal entity through which Hallman managed the affairs of WDIX. Hallman owns all the shares in Palmetto Communications, Inc.

26. When Rickenbacker failed to make the first $5,000 payment, due November 30, 1989, under the November 6, 1989 agreement, Hallman took no steps to collect the money or to find out if Rickenbacker intended to participate as a owner of WDIX. When Rickenbacker attended a Christmas parade in Yadkinville in early December 1989, he told Hallman he was not going to contribute to the partnership. Rickenbacker never went to Yadkinville again. Shortly thereafter, Hallman returned to Rickenbacker the equipment he had brought to WDIX and Hallman and his spouse both told Rickenbacker he was not an owner. While during the hearing Hallman said that he was still waiting for Rickenbacker to indicate he did not want to be a partner, his testimony in that regard amounts to pretense. Hallman's actions were those of someone who held complete control. He established two bank accounts for Palmetto Communications, Inc., one in Yadkinville for deposits from WDIX and another in Summerville, South Carolina for paying WDIX's bills. Palmetto Communications, Inc. filed tax returns on which it claimed all of WDIX's losses. Hallman, as the sole owner of the corporation, under Subchapter S, claimed them on his return. There was no partnership return filed. Hallman has represented to the Commission that WDIX is owned by the Palmetto partnership and to the IRS that it is a corporation owned only by him. On July 30, 1990, Palmetto filed an ownership report for WDIX in which Hallman and Rickenbacker were represented as partners and owners of the station. The Hallmans maintain the IRS filings, the FCC ownership report, the numerous documents which appear to identify the owner of the station as the corporation were mistakes. That excuse is no more creditable than Rickenbacker's claim that the assignment was never consummated and that he never held an ownership interest.

27. While these issues have been pending, Palmetto has not acted in good faith with regard to the Bureau and Triad's document request. Material documents were not identified or produced until just before the hearing.

28. Palmetto's owner, William Hallman, failed to notify the Commission, during this proceeding, when he took full control of station WDIX. He knew in December 1989 that was the case. In November 1989, Hallman took steps to legally control WDIX when he set up Palmetto Communications, Inc., which served as a vehicle to pass through the tax advantages derived from WDIX and to manage its business affairs. There is ample evidence that from November or December of 1989, Hallman thought of himself as the only owner of the station. Palmetto argues that Hallman's actions exhibit only carelessness and appears to maintain that Hallman and Rickenbacker still are partners. There is no legal document that defines the Hallman and Rickenbacker partnership and all the facts after November 6, 1989, and most before, show there was no partnership relationship which exercised control over broadcast station WDIX. From the first filing Palmetto made to the Commission, it failed to report truthfully how the station would be owned. Moreover, in this proceeding Hallman and Rickenbacker failed to tell the truth about the ownership of WDIX. Palmetto is not qualified.

In light of the resolution of this issue, Triad is the only remaining applicant. Triad is qualified and a grant of its application would serve the public interest.

ACCORDINGLY, IT IS ORDERED that the motions to correct the transcript, filed September 18, 1991 by Palmetto Communications Company and Robert Carroll Rickerbacker, Jr. ARE GRANTED.

IT IS FURTHER ORDERED that the petition for leave to file information pursuant to section 1.65 of the Commission's rules, filed October 25, 1991 by Palmetto Communications Company IS GRANTED.

IT IS FURTHER ORDERED that the motion to strike, filed October 28, 1991 by Robert Carroll Rickenbacker, Jr. IS DISMISSED AS MOOT.

IT IS FURTHER ORDERED that the application of Palmetto Communications Company (File No. BP-870331BK) IS DENIED and the application of Triad Network, Inc. (File No. BP-870928AA) for a construction permit for a new AM station in Greensboro, North Carolina on 1470 kHz IS GRANTED.[1]

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

FOOTNOTE

[1] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision will become effective 50 days after its public release pursuant to Sec. 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-168

In the matter of

Codification of the Commission's
Political Programming Policies

MEMORANDUM OPINION AND ORDER

Adopted: February 12, 1992; Released: February 14, 1992

By the Commission:

1. By this *Order*, we reconsider and revise our rules concerning compliance with the sponsorship identification requirements[1] applicable to political broadcasting advertisements. This action modifies the requirements recently adopted in our *Report and Order* in this docket, released December 23, 1991.[2] Due to the urgent need for clarity in this area and the immediacy of numerous primary elections in this important campaign year, we have determined that we should act promptly to adopt the modified requirements set forth herein without awaiting completion of the full comment cycle for petitions for reconsideration.[3] In taking this action, however, we have fully considered the comments on this issue in the underlying proceeding.[4]

2. In our December *Report and Order* we imposed both an audio and video sponsorship identification requirement for televised political advertisements, but declined to adopt specific objective measurement criteria to use to assess compliance with the video obligation. In response to petitions for reconsideration addressing these particular decisions,[5] we have decided to delete the audio identification requirement and to impose specific, objective standards for video sponsorship identification.

3. *Audio Identification.* In the *Notice of Proposed Rule Making* in this proceeding, the Commission asked for comment on the possibility of requiring both audio and visual sponsorship identification for television advertisements.[6] Most commenters did not address this specific issue, and there appeared to be little support for this requirement.[7] Nevertheless, citing our belief that providing both audio and video information would better inform persons suffering from visual impairments, as well as viewers listening to but not actually watching a program, of the sponsors of political advertisements, we adopted the proposal.[8]

4. Petitions for reconsideration have been filed by both the Democratic and Republican National Committees objecting to the new audio identification requirement. According to petitioners, adoption of this additional obligation has imposed an excessive burden upon political advertising, particularly with respect to shorter advertisements, such as 10 or 15 second spots. In particular, petitioners claim that the audio identification requirement impairs a candidate's ability to deliver a campaign message in short spots because a substantial amount of time must be devoted to the voice-over identification. While we note that the *Report and Order* did not specify the duration of the audio portion of sponsorship identification,[9] upon further reflection we agree that requiring any additional audio component that would be of sufficient duration to ensure adequate identification to the average listener may well be unduly burdensome to candidates, particularly for short spot announcements.

5. We are statutorily obligated to ensure proper identification of any broadcast advertising, and remain committed to assisting the visually impaired. We would therefore encourage political advertisers to consider their special needs when designing their advertisements. The Commission, however, does not intend to restrict or unduly interfere with the content of political messages. Thus, upon reconsideration, we have determined that the additional audio identification requirement should not be imposed,[10] and we hereby eliminate that obligation.[11]

6. *Visual requirements.* In the *NPRM* we noted that there has been increased Congressional interest in more rigorous sponsorship identification requirements, and that the Commission had received proposals for adoption of specific, objective criteria governing visual identification requirements.[12] Nevertheless, in the *Report and Order* we decided that further objective visual requirements were unnecessary.[13] In view of our decision to delete the audio identification rule, however, we believe that the record in this proceeding indicates that certain minimal standards should be articulated with respect to video identification.[14] Specific visual identification requirements would satisfy the need for more objective guidelines cited by the majority of commenters, would ensure that the sponsor of political advertisements is readily apparent to viewers, and would not appear to be unduly burdensome from a compliance perspective.[15]

7. We have thus reevaluated our previous conclusion and have determined that it is appropriate to adopt specific sponsorship identification requirements along the lines of those originally discussed in the *NPRM*. We conclude that, in order to comply with the sponsorship identification requirements imposed by Section 317 of the Communications Act with respect to televised political advertisements, we will henceforth require a minimum video identification of the sponsor with letters equal to or greater than four percent of the vertical picture height, and airing for not less than four seconds.[16]

8. We note that commenters opposing adoption of specific standards for sponsorship identification were concerned primarily that it would be too difficult to implement with precision the time duration and size requirements. In this regard, we emphasize that the reasonableness standard traditionally employed by the Commission in evaluating compliance with our regulations will apply to enforcement of these requirements. Thus, any reasonable basis for determining the size and timing used by broadcasters to comply with the objective criteria outlined above will be treated deferentially by the Commission. We accordingly believe that, rather than imposing undue burdens upon broadcasters, adoption of these standards will significantly assist stations by providing clear standards for compliance with the statutory requirement.[17]

9. Several commenters had also suggested that if the Commission imposed definitive sponsorship identification standards, broadcasters should have the right to require

pre-airing submissions to ensure that advertisements met the Commission's standards.[18] In view of our decision to adopt specific standards for visual identifications with which broadcasters must now comply, we agree that, under normal circumstances, stations should have the right to pre-screen the sponsorship identification element of a political advertisement to ensure that it meets the new standards.[19] We recognize, however, that there may be instances in which there is not sufficient time for the broadcaster to review a political advertisement and still schedule the material as requested by the candidate. In these circumstances, fairness dictates that the advertisement air in a timely fashion and not be delayed. Accordingly, where there is not enough time for a broadcaster to pre-screen the sponsorship identification in a political advertisement, we will permit the station to run the ad the first time without risking a Commission finding of a Section 317 violation.[20] Once the advertisement has aired, however, the station will be required to add the required identification for future broadcasts if the advertisement is not in compliance with our sponsorship identification requirements.[21]

10. Finally, we wish to emphasize that nothing in this ruling alters our prior policies requiring that political advertisements contain information that is sufficient to allow viewers to identify the real sponsor of the ad.[22] Particularly in light of the increasing use of negative advertising, the Commission remains committed to ensuring that the public can reasonably identify who is using broadcast facilities to promote or oppose particular political candidacies.

ORDERING CLAUSES

11. Accordingly, IT IS ORDERED, that the Petitions for Reconsideration filed by People for the American Way and Media Access Project; CBS, Inc.; Capital Cities/ABC, Inc.; The Democratic National Committee and The Democratic Senatorial Campaign Committee and The Democratic Congressional Campaign Committee; The Republican National Committee and The National Republican Senatorial Committee and The National Republican Congressional Committee; National Association of Broadcasters; Multi-Media, Inc.; and A.H. Belo Corporation *et. al.* ARE GRANTED to the extent indicated herein.

12. IT IS FURTHER ORDERED that, pursuant to authority contained in Sections 317, 303(r), and 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 317, 303(r), 154(i), the Commission's Rules ARE AMENDED as set forth in Appendix B to this *Order*, effective April 1, 1992.[23]

13. Further information on this proceeding may be obtained by contacting Milton O. Gross, Robert L. Baker, Marsha J. MacBride or Maureen O'Connell, Mass Media Bureau at (202) 632-7586, or Diane Hofbauer, Office of General Counsel, at (202) 632-6990.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Petitions for Reconsideration of the *Report and Order* in MM Docket No. 91-168 were filed by the following:

1) People for the American Way and Media Access Project;

2) Multi-Media, Inc.;

3) The Republican National Committee, The National Republican Senatorial Committee and the National Republican Congressional Committee;

4) The Democratic National Committee, The Democratic Senatorial Campaign Committee and The Democratic Congressional Campaign Committee;

5) The National Association of Broadcasters;

6) CBS, Inc.;

7) Citizens Communications Center, Institute for Public Representation and Georgetown University Law Center;

8) Capital Cities/ABC, Inc.;

9) Telecommunications Research and Action Center and the Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights;

10) A.H. Belo Corporation, Cordillera Communications, Inc., Cox Enterprises, Inc., Duchossois Communications Company, Guy Gannett Publishing Co., Multimedia, Inc., and River City License Partnership.

APPENDIX B

The last sentence of Section 73.1212(a)(2)(i) is deleted. A new Section 73.1212(a)(2)(ii) is added to read as follows:

(ii) In the case of any television political advertisement concerning candidates for public office, the sponsor shall be identified with letters equal to or greater than four percent of the vertical picture height that air for not less than four seconds.

The last sentence of Section 76.221(a) is deleted. A new last sentence to Section 76.221(a) is added to read as follows:

In the case of any political advertisement cablecast under this subsection that concerns candidates for public office, the sponsor shall be identified with letters equal to or greater than four percent of the vertical picture hieght that air for not less than four seconds.

FOOTNOTES

[1] 47 U.S.C. § 317.

[2] 7 FCC Rcd 678 (1992).

[3] We recognize that in many states the campaign season is underway, and therefore candidates have already produced political advertisements in accordance with the decisions made in our December *Report and Order*. Because we do not wish to impose undue burdens upon candidates or broadcasters and seek to minimize disruption of commercials already prepared, political advertisements need not comply with the specific standards adopted herein until April 1, 1992. In the interim, political advertisements will be deemed to satisfy the Commission's sponsorship identification requirements if they comply with either the standards adopted herein, or the standards applicable following the December *Report and Order*.

[4] In addition, of course, petitioners may request reconsideration of this order, which would enable us to consider further public comment if necessary.

[5] On February 3, 1992, the Commission received several Petitions for Reconsideration addressing various issues governed by the *Report and Order*. A complete list of these petitions is set forth as Appendix A. The Commission will consider all of the issues raised in these petitions in due course.

[6] *See Notice of Proposed Rule Making*, 6 FCC Rcd 5707 (1991) (*NPRM*) at paragraph 31.

[7] The proposal was generally supported by the Federal Election Commission (FEC) and Gillett. The National Association of Broadcasters (NAB) and North Carolina Association of Broadcasters (NCAB) strongly opposed the proposal.

[8] *Report and Order* at paragraph 47.

[9] *See Report and Order* at paras 46-47. In their petitions, both the Democratic and Republican National Committees appear to have assumed that we adopted a specific six second audio identification requirement for television advertisements, to which they strenuously object. In the *Report and Order*, however, we merely meant to suggest that sponsorship identifications would be presumptively reasonable if they met the standards originally suggested in the NPRM, including a *video* identification of a six second duration.

[10] In addition, Multi-Media, Inc., a small cable system operator, contends that requiring an audio identification, or voice-over, to be added to information delivered on a character-generated access channel that is not accompanied by audio information or comment would be overly burdensome and possibly cost prohibitive to cable system operators. In view of our decision to delete the audio identification requirement, we need not address the specific concerns raised by Multi-Media, Inc.

[11] We note, however, that FECA may require an audio identification for radio broadcasts of the audio portion of television programs. *See* comments of FEC at 5.

[12] *NPRM* at paras 26-30.

[13] *Report and Order* at paragraph 44.

[14] We note that the majority of commenters supported adoption of objective criteria, particularly in light of the emergence of negative political advertisements. *See Report and Order* at paragraph 43. Commenters opposing adoption of objective visual identification criteria were NAB, NCAB, CBS and Group W. The concerns raised by these commenters are addressed *infra*.

[15] The video sponsorship identification requirements we impose herein are more easily integrated into the candidate's political message than an audio identification requirement and, hence, are less burdensome and intrusive.

[16] The *NPRM* proposed requiring that the identification air for a minimum of six seconds. *See NPRM* at paragraph 28. The original petition seeking adoption of specific objective criteria for sponsorship identification limited the airing requirement to four seconds. *See* People for the American Way and Media Access Project (PAW/MAP) Petition at 1. Because of our desire to minimze interference with the content and design of political messages, we will limit the airing requirement to the original proposal of four seconds. Similarly, to minimize intrusion into the content and design of political messages, we decline to adopt any requirement that, in order to qualify as a "use," the candidate's image must be equal to or greater than 20% of the picture size.

[17] Of course, if factors other than size or air time prevent the fact of sponsorship and identity of the sponsor from being conveyed to viewers, such as lack of picture contrast or inclusion of significant distractions, a violation of Section 317 conceivably could be found despite "technical" compliance with these requirements.

[18] Moreover, we note that in their petitions for reconsideration of various decisions in the *Report and Order*, Capital Cities/ABC, Inc. and A.H. Belo Corporation *et. al.* seek clarification or reconsideration of the Commission's policy with respect to station's rights to pre-screen political advertisements to ensure compliance with our sponsorship identification rules.

[19] We note that in their petitions for reconsideration, CBS, Inc., NAB and Capital Cities/ABC, Inc. request clarification that a broadcaster may decline to air political announcements which lack adequate sponsorship identification. If a candidate has a statutory right of access or contingent access (i.e. pursuant to section 312(a)(7) or 315(a) for federal candidates, or section 315(a) for state and local candidates), broadcasters may not refuse to air political advertisements with inadequate sponsorship identification. Rather, the station is obligated to add its own identification. In this regard, we note that the sponsorship identification requirement is an established exception to the prohibition in section 315(a) against censorship of candidates' uses of broadcast station facilities. *See Joint Agency Guidelines for Broadcast Licensees*, 69 FCC 2d 1129, n.2 (1978). Accordingly, stations may alter political advertisements in order to add appropriate sponsorship identification in compliance with this rule.

[20] We note that subsection (d) of Section 317 allows the Commission to waive the sponsorship identification requirement. *See* 47 U.S.C. §317(d).

[21] In the event the station cannot add the required visual identification immediately without taking extraordinary measures, we will allow the station to add only an aural identification, as long as the proper visual information needed is added within one business day of its first airing. We note that licensees need not provide additional time, free of charge, in order to satisfy the sponsorship identification rules, and that they may therefore include the necessary information within the advertisement itself. *Report and Order* at para. 49.

[22] *See* 47 CFR §73.1212(e) (1992); *see also KOOL-TV*, 26 FCC 2d 42 (1970) ("A Lot of People Who Would Like to See Sam Grossman Elected to the U.S. Senate" lacked the specificity required for compliance with Section 317).

[23] *See* also note 3, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation — 38321

MEMORANDUM OPINION AND ORDER

Adopted: January 16, 1992; Released: February 14, 1992

By the Commission: Commissioner Marshall not present.

1. In this order, we grant a petition filed by BellSouth Corporation (BellSouth) requesting that the Commission preempt a decision by the Georgia Public Service Commission (Georgia PSC) prohibiting provision of BellSouth's voice mail service to new customers in Georgia.

I. BACKGROUND

2. On June 4, 1991, the Georgia PSC issued an *Order* that found that BellSouth had engaged in anticompetitive conduct in Georgia directed at the independent voice mail industry.[1] The Georgia PSC stated that it would develop regulatory controls encompassing: (1) tariffing and rate regulation of enhanced services; (2) comparably efficient interconnection (CEI) requirements; (3) Customer Proprietary Network Information (CPNI) rules; and (4) marketing restrictions, possibly including an entirely separate organization for marketing BellSouth's voice mail service.[2] The Georgia *Order* "froze" BellSouth's voice mail service provided in the state, pending the design and implementation of these regulatory controls and the filing of a cost of service study by BellSouth. BellSouth's provision of the service was temporarily restricted to those customers who had already subscribed, preventing other customers from obtaining this service. The Georgia PSC said that BellSouth's voice mail service is a purely intrastate enhanced service and that its freeze would not, therefore, affect federal interests.[3]

3. On June 14, 1991, BellSouth petitioned the Commission for emergency declaratory relief from the Georgia *Order*.[4] BellSouth requests that the Commission declare that: (1) BellSouth's voice mail service is not a purely intrastate enhanced service; (2) the Commission has jurisdiction over the sale and provision of the interstate portion of its voice mail service; and (3) the Georgia PSC is preempted, pending final resolution of the issues in the *BOC Safeguards Proceeding*,[5] from restricting or barring BellSouth from providing and marketing its voice mail service under the terms and conditions set forth in its approved CEI plan.[6]

4. The BellSouth petition contends that BellSouth's voice mail service is a jurisdictionally mixed service that cannot be separated into distinct jurisdictional portions for purposes of state entry/exit regulation and sales activities.[7] The petition further contends that the Georgia action negates federal communications policy and jurisdiction over the voice mail service as embodied in BellSouth's federal CEI plan and interim waiver for service.[8] The petition argues that preemption of the Georgia *Order* is warranted on two independent grounds: (1) the Georgia *Order* attempts to regulate interstate communications directly; and (2) insofar as applicable to intrastate communications, it negates federal objectives because of the inseverability of voice mail service for purposes of entry/exit regulation and marketing restrictions.[9] The petition also argues that preemption would be consistent with the May 16, 1991 resolution of the Federal-State Joint Conference that enhanced services should not be subject to tariffing and entry/exit regulation.[10]

5. The petition states that the Georgia PSC's allegations of anticompetitive conduct by BellSouth are either untrue, unfounded, or addressed by federal requirements.[11] According to BellSouth, the Georgia PSC *Order* harms the public interest because it prevents thousands of additional customers in Georgia from receiving voice mail

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[1] *In the Matter of the Commission's Investigation into Southern Bell Telephone and Telegraph Company's Provision of MemoryCall Service, Order of the Commission (Order)*, Georgia Docket No. 4000-U (June 4, 1991).

[2] *Id.* at 48-50.

[3] *Id.* at 52-55, 56-57.

[4] Comments and Reply Comments on the BellSouth petition were filed by the parties listed in the attached Appendix.

[5] *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, Notice of Proposed Rulemaking*, CC Docket No. 90-623, 6 FCC Rcd 174 (1990). The Commission has resolved the issues in that proceeding. *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, Report and Order (BOC Safeguards Order)*, CC Docket No. 90-623, FCC 91-381, released December 20, 1991.

[6] BellSouth Petition at 1-2. BellSouth Plan for Comparably Efficient Interconnection for Voice Messaging Services, 3 FCC Rcd 7284, 7291 (1988).

[7] BellSouth Petition at 3, 10-12.

[8] *Id.* at 20-21. In *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990), the Ninth Circuit vacated *Computer III*, generally returning the industry to the *Computer II* regime. Shortly thereafter, the Commission waived *Computer II* requirements to permit the Bell Operating Companies (BOCs) to continue to offer enhanced services on an integrated basis pursuant to previously approved CEI plans. Bell Operating Companies' Joint Petition for Waiver of Computer II Rules, 5 FCC Rcd 4714, 4715, para. 10 (Com.Car.Bur. 1990). Computer III Remand Proceedings: Bell Operating Company Safeguards, Notice of Proposed Rulemaking and Order, 6 FCC Rcd at 191, n.135.

[9] BellSouth Petition at 18-19.

[10] *Id.* at 21. The Federal-State Joint Conference on Open Network Architecture was established by the Commission in the *BOC ONA Order* in response to industry and state comments in the *ONA Proceeding* urging the Commission to establish a forum for continuing dialogue and cooperation between the Commission and the states. The Joint Conference serves as a forum to facilitate federal/state cooperation and the successful development and implementation of ONA.

[11] *Id.* at 26-29.

service.[12] The petition also states that the requested relief should be considered on an emergency basis to prevent continued harm to the public.[13]

II. Discussion

6. Whether a state may impose requirements on communications will depend on an analysis under the Supremacy Clause of Article VI of the U.S. Constitution.[14] State requirements are invalid under the Supremacy Clause if they, for example, apply to an area that Congress has intended the federal government to occupy exclusively.[15] We have recently had occasion to reiterate that Congress intended interstate communications to be regulated exclusively by the Commission.[16] Where, as here, interstate services are jurisdictionally "mixed" with intrastate services and facilities otherwise regulated by the States, state regulation of the intrastate service that affects interstate service will not be preempted unless it thwarts or impedes a valid federal policy.[17]

7. In the case before us, the Georgia *Order* bars any provision by BellSouth of its voice mail service to new customers in Georgia. We find that the Georgia *Order* applies in part to an interstate service because BellSouth's voice mail service is jurisdictionally mixed. We also find that it is not possible to separate the interstate and intrastate provision of the service without impermissably barring the interstate provision of the service. We therefore preempt the *Order* insofar as it bars provision by BellSouth of its jurisdictionally mixed voice mail service.[18]

8. *Jurisdictional character of BellSouth's voice mail service.* The Georgia PSC and state commenters contend that BellSouth's voice mail service is a purely or predominantly intrastate service.[19] They contend that when the voice mail service is accessed from out-of-state, two jurisdictional transactions take place: one from the caller to the telephone company switch that routes the call to the intended recipient's location, which is interstate, and another from the switch forwarding the call to the voice mail apparatus and service, which is purely intrastate.[20] The states contend that all of the services associated with the latter transaction, such as call forwarding, are locally tariffed and purely intrastate and that only these services are used in the provision of voice mail service.[21] They contend that the Court of Appeals for the Ninth Circuit, in vacating the preemption of state regulation of enhanced services fashioned by the Commission in *Computer III*, stated that voice mail service is an example of a purely intrastate enhanced service.[22] BellSouth contends that its voice mail service is jurisdictionally mixed in that it is accessed and used by both in-state and out-of-state callers.[23] NYNEX, Bell Atlantic, Central Telephone, several enhanced service providers (ESPs), and a number of other parties who use or manufacture components of voice mail services agree that voice mail is a jurisdictionally mixed service.[24]

9. We conclude, based on the record, that BellSouth's voice mail service is capable of receiving, and does receive, calls from out-of-state as well as in-state locations.[25] These calls can be from persons calling the voice mail customer, or from the customer calling to obtain messages recorded by the voice mail service. As explained by BellSouth, when a caller is connected to BellSouth's voice mail service, receives instructions and/or a message, and records a message, there is a continuous two-way transmission path from the caller location to the voice mail service. When the caller is out-of-state, there is a continuous path of communications across state lines between the caller and the voice mail service, just as there is when a traditional out-of-state long distance voice telephone call is forwarded by the local switch to another location in the state and answered by a person, a message service bureau or customer premises answering device.

10. Under the Communications Act the Commission has jurisdiction, *inter alia*, over "all interstate and foreign communications by wire or radio."[26] Interstate commu-

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[12] *Id.* at 22-25.

[13] *Id.* at 2-3.

[14] *Operator Service Providers of America*, 6 FCC Rcd 4475 (1991).

[15] *English v. General Electric Co.*, 110 S.Ct. 2270 (1990); *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 368 (1986); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947); *See also NY State Commission on Cable TV v. FCC*, 669 F.2d 58, 66 (2d Cir. 1982); *Scneidewing v. ANR Pipe Line Co.*, 485 U.S. 293 (1988).

[16] *Operator Service Providers of America*, 6 FCC Rcd 4475 (1991).

[17] See cases cited at n.51, *infra*.

[18] Some commenters contend that we should not grant the BellSouth petition because of the allegations of anticompetitive conduct before the Georgia PSC and/or that we should examine those allegations at the federal level. *See e.g.*, Cox Enterprises Comments at 3-9; Compuserve Comments 13; Assn. of Telemessaging Services Comments at 11-13; ATC Comments at 5-6; American Newspaper Publishers Comments at 4-10. The limited step of preempting the Georgia PSC *Order* insofar as it freezes the provision of BellSouth's voice mail service neither requires nor precludes state or federal examination of anticompetitive conduct by BellSouth or other BOCs. The Georgia PSC can continue its proceeding to fashion regulatory controls, and we can carefully examine allegations of anticompetitive conduct by BellSouth or other BOCs.

[19] Georgia PSC Comments at 1-2, 18-21; NARUC Comments at 9-11; DC PSC Comments at 2; California PUC Comments at 7-8; New York DPS Comments at 2; Florida PSC Reply Comments at 2, 5-6. However, the states additionally maintain that some interstate use of BellSouth's voice mail service does not change its essentially intrastate character. The DC PSC argues that BellSouth should be required to certify that at least ten percent of the calls to its voice mail service are interstate. If BellSouth is unable to make such a certification, then the DC PSC argues the voice mail service should not be subject to federal jurisdiction. DC PSC Comments at 3-4.

[20] California PUC Comments at 8-9; NARUC Comments at 10-11; Georgia PSC Comments at 19-20; Florida PSC Reply Comments at 4.

[21] Georgia PSC Comments at 20-21; NARUC Comments at 9.

[22] NARUC Comments at 10-11.

[23] BellSouth asserts that the interstate usage of its voice mail service is sufficient to warrant federal preemption of the Georgia *Order* 's freeze of the service. BellSouth Reply Comments at 2.

[24] NYNEX Comments at 3; Bell Atlantic Comments 1-2; Central Telephone Comments 2; Prodigy Services Comments at 1; MessagePhone Comments at 4-5; California Bankers Comments at 2-5; IBM Comments at 4-5; Unisys Comments at 2; Information Industry Assn. Comments at 9; CompuServe Comments at 2, n. 1; Assn. Telemessaging Services Comments at 4; BT North America Reply Comments at 10.

[25] BellSouth Petition at 10.

[26] 47 U.S.C. Section 152(a).

nications is defined as communication or transmission from one state or the District of Columbia to another.[27] Further, communication by wire is defined as the "transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection *between the points of origin and reception of such transmission, including the instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission* (emphasis added)." [28] Thus, under the Act, when a caller to BellSouth's voice mail service is out-of-state, whether it is a person calling the voice mail service to leave a message for the customer or the voice mail customer calling the service to access messages, there is an interstate communication.

11. The language of the Act also contradicts the narrow reading of our jurisdiction urged by the states that would artificially terminate our jurisdiction at the local switch and ignore the "forwarding and delivery of [the] communications" to the "instrumentalities, facilities, apparatus and services" that comprise BellSouth's voice mail service. Indeed, the communications from the out-of-state caller to the local telephone number and switch, its forwarding to the voice mail service by the local switch, and its receipt and interaction with BellSouth's voice mail service, fall within the explicit subject matter jurisdiction of this Commission under the Act.

12. Our jurisdiction does not end at the local switch but continues to the ultimate termination of the call. "The key to jurisdiction is the nature of the communication itself rather than the physical location of the technology.[29] "[J]urisdiction over interstate communications does not end at the local switchboard, it continues to the transmission's ultimate destination."[30] The fact that the facilities and apparatus used to provide BellSouth's voice mail service may be located within a single state, this does not affect our jurisdiction or expand the Georgia PSC's jurisdiction. This Commission has jurisdiction over, and regulates charges for, the local network when it is used in conjunction with origination and termination of interstate calls.[31] The Commission also has made it clear that it has not ceded jurisdiction over call forwarding when used in interstate communications even if that service is locally tariffed.[32] An out-of-state call to BellSouth's voice mail service is a jurisdictionally interstate communication, just as is any other out-of-state call to a person or service. Accordingly, we reject the view that BellSouth's voice mail service is purely intrastate.[33] Like the basic communications services provided by local exchange carriers, it is jurisdictionally mixed.[34] Therefore, the Georgia PSC *Order* prohibiting BellSouth from offering its voice mail service to additional customers directly regulates the provision of interstate communications in the state -- the interstate provision of BellSouth's voice mail service.

13. *Practical Inseverability of Interstate and Intrastate Provision of BellSouth's Voice Mail Service.* The Georgia PSC, the DC PSC, and NARUC contend that the use of SS7 technology will enable BellSouth to identify, and block, calls to the voice mail service that originate in-state.[35] BellSouth avers that it has no feasible means of identifying the origin of the calls to its voice mail service.[36] BellSouth states that, at its current level of deployment, SS7 technology does not enable identification of the origin of calls to the voice mail service, and it will not be able to do so "for a number of years." BellSouth further states that the identification of every interstate call would require all inter-exchange carriers to deploy SS7.[37] Other commenters, such as BellSouth, Bell Atlantic, NYNEX, and several ESPs or other concerned parties, including Prodigy Services, MessagePhone, California Bankers Clearing House, Unisys, and IBM, urge the Commission to preempt.[38] The California PUC would have BellSouth obtain information from interexchange carriers on the origin of specific calls to the voice mail service rather than finding the traffic to be inseverable.[39] The New York DPS asserts that preemption is not warranted because inseverability of interstate and intrastate portions is a valid basis for preemption only in narrow circumstances where contrary state regulation deprives customers of access to interstate basic service.[40] The Florida PSC argues that BellSouth's reliance on the authority of *NARUC v. FCC*, 746 F.2d 1492 (D.C. Cir. 1984) ("NARUC II") to support its jurisdictional arguments is misplaced, because that case concerns a basic service which is not analogous to BellSouth's voice mail service: an interstate WATS service with each call comprising a

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[27] 47 U.S.C. Section 153(e).

[28] 47 U.S.C. Section 153(a).

[29] *New York Telephone Co. v. FCC*, 631 F.2d 1059, 1066 (2d Cir. 1980). *See also United States v. AT&T*, 57 F. Supp. 451, 454 (S.D.N.Y. 1944), *aff'd sub nom. Hotel Astor v. United States*, 325 U.S. 837 (1945); *Puerto Rico Tel. Co. v. FCC*, 553 F.2d 694, 699 (1st Cir. 1977); *MCI Communications Corp. v. AT&T*, 369 F. Supp. 1004, 1029 (E.D. Pa. 1973).

[30] *Southern Pacific Communications*, 61 FCC 2d at 146, *citing U.S. v. AT&T*, 57 F. Supp. 451 (S.D.N.Y. 1944).

[31] *MTS and WATS Market Structure (Phase II)*, 93 FCC 2d 241 (1983), *aff'd, NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 105 S.Ct. 1224 (1985).

[32] *BOC ONA Order*, CC Docket 88-2, 4 FCC Rcd 1,144 n.628 (1988).

[33] Contrary to the assertion of some commenters, the Ninth Circuit did not hold that voice mail service is a purely intrastate enhanced service. *California v. FCC*, 905 F.2d 1217, 1244 (9th Cir. 1990). The issue of whether any particular enhanced service, including voice mail, was purely intrastate was not specifically before the Court nor was any record developed on any particular enhanced service. The Court noted that state petitioners had identified certain services, including voice mail service, as purely intrastate and faulted the Commission, in its preemption analysis, for failing to consider whether some enhanced services might be offered on a purely intrastate basis. The Court did not make an independent finding of fact that voice mail service is intrastate. Indeed, it is not the function of a reviewing court to make independent findings of fact.

[34] The commenters cited at note 24, argue that the Commission has jurisdiction over the interstate portion of jurisdictionally mixed enhanced services.

[35] Georgia PSC Comments at 21-22, DC PSC Comments at 5-6, NARUC Comments at 12.

[36] BellSouth Petition at 10-12.

[37] BellSouth Reply Comments at 2.

[38] Bell Atlantic Comments at 1-3; NYNEX Comments at 3; Prodigy Services Comments at 1; MessagePhone Comments at 4-5; California Bankers Comments at 2-5,8; Unisys Comments at 2; IBM Comments at 13; Central Telephone Comments at 2; Information Industry Assn. Comments at 9; BT North America Reply Comments at 2.

[39] California PUC Comments at 10-11.

[40] New York DPS Reply Comments at 1-3.

single interstate transaction.[41] The Georgia PSC additionally argues that BellSouth cannot demonstrate that the state regulation goes as far as to thwart or impede federal objectives.[42]

14. BellSouth's voice mail service is provided and marketed, and uses the same equipment and underlying basic, services, without regard to the jurisdictional nature of a customer's use of the service in general or for a particular call. Effectuation of the Georgia PSC's *Order* so that it "freezes" only the intrastate portion of the voice mail service while not affecting the interstate portion would require BellSouth to continue to provide and market the interstate portion while not providing and marketing the intrastate portion. This would require a way to identify the origin of every call to the voice mail service so that the intrastate use could be blocked. However, it is not now technically feasible for BellSouth to do so.[43] Thus, BellSouth would not be able to jurisdictionally identify calls so as to permit interstate ones to be completed to the voice mail service and intrastate ones to be blocked. Moreover, because the Georgia PSC freeze applies only to new customers, to comply with it without affecting interstate use would require BellSouth additionally to distinguish operationally between existing customers and new customers, and permit completion of all calls for the former while blocking intrastate, but not interstate, calls for the latter. Given these operational and technical difficulties, it is not feasible for BellSouth to bar the intrastate portion of the voice mail service without also barring the interstate portion.

15. Complying with the Georgia *Order* only for the intrastate portion of the voice mail service additionally assumes that BellSouth could market an interstate-only voice mail service.[44] We have recently explained in a closely related area why it is not feasible to market interstate and intrastate enhanced services separately.[45] Most customers want voice mail service for both interstate and intrastate use.[46] Given that most users will want both jurisdictional usages, it is not likely that a separate interstate service would find acceptance, especially in the mass market.[47] Even if a separate interstate service were extremely inexpensive, a customer who wanted both jurisdictional services would find it uneconomical and unnecessary to subscribe to a BellSouth interstate service and a competitor's service that offered both interstate and intrastate portions. It would additionally be necessary to seek to explain to customers why intrastate use was unavailable. Therefore, it is additionally not feasible to comply with the Georgia *Order* only for the intrastate portion of the service because it is not possible to market an interstate voice mail service separately.

16. Apart from the foregoing, it is not realistic to expect that the carrier will undertake the expense and difficulties of seeking to offer an interstate-only voice mail service on a temporary basis. Instead, as is the case before us, the carrier will halt all sales of the service for both interstate and intrastate use, depriving customers of an interstate telecommunications capability they want.[48] Effectuation of the state bar thus will, as a practical matter, bar the interstate provision of the service as well as the intrastate provision.

17. *Preemption Analysis.* Section 2(a) of the Communications Act specifically grants the Commission jurisdiction over "all interstate and foreign communicatins by wire or radio."[49] At the same time, Section 2(b) of the Act retains for the states "jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for in connection with intrastate communications by wire..."[50] Given this split in jurisdictional authority, the question as to when and under what circumstances the FCC may preempt state regulation of an intrastate matter has arisen quite often.

18. The Supreme Court, in *Lousiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986) articulated the test for determining when preemption is consistent with Section 2(b) of the Act. The Commission may preempt state regulation when the state regulation would thwart or impede the exercise of lawful federal authority over inter-

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[41] Florida PSC Comments at 3-5.

[42] Georgia PSC Comments at 17.

[43] BellSouth Reply Comments at 16-17. As the terminating LEC on interLATA calls, BellSouth currently receives no information on the origin of calls which it can pass on to the voice mail service. Automatic Number Identification (ANI) is not transmitted by the interexchange carrier to the terminating LEC which passes the call to the voice mail service. ANI, which is the billing number of the caller, is transmitted on most interLATA calls. ANI, however, provides a billing number, not the caller's telephone number, and does not necessarily disclose his location. In addition, ANI is not transmitted by the interexchange carrier to the terminating LEC, but only from the originating LEC to the interexchange carrier for billing purposes. The caller's telephone number and corresponding location are currently available to the voice mail service if a call is handled entirely by a single LEC that transmits the Calling Party Number via SS7 signalling where that technology has been deployed. That information is not available in other circumstances.

[44] Both the New York DPS and the Florida PSC attempt to find distinctions between basic and enhanced services in previous preemption cases. The New York DPS argues that the North Carolina Utility Cases, *NCUC v. FCC*, 537 F.2d 787 (4th Cir. 1976), *cert. den.*, 429 U.S. 1027 (1976) and *NCUC v. FCC*, 552 F.2d 1036 (4th Cir. 1977), *cert. den.*, 436 U.S. 874 (1977), should not control here because the state regulation preempted in those cases involved a basic service. New York DPS Reply Comments at 3. The *NCUC* courts made no such distinction. The Florida PSC argues that BellSouth cannot rely on the authority of *NARUC v. FCC*, 746 F.2d 1492 (D.C. Cir. 1984), because that case also involved a basic service. Florida PSC Comments at 4. While BellSouth's voice mail service is an enhanced service, that fact does not limit our authority to preempt. We have found that enhanced services are not within our Title II jurisdiction, but are subject to our ancillary jurisdiction. The Court of Appeals for the District of Columbia Circuit has held specifically that there is "no critical distinction between preemption by Title II regulation and preemption by the exercise of ancillary jurisdiction." *Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198,217 (D.C. Cir. 1982, *cert. denied*, 461 U.S. 938 (1983). *See also California v. FCC*, 905 F.2d 1217, 1239-43 (9th Cir. 1990)) (FCC's authority to preempt state regulation of enhanced services is unaffected by whether its own regulation arises under Title II or under its ancillary authority).

[45] *BOC Safeguards Order.*

[46] BellSouth Reply Comments at 12-13.

[47] BellSouth Petition at 12, 19-20.

[48] BellSouth Petition at 3-4.

[49] 47 U.S.C. Section 152(a).

[50] 47 U.S.C. Section 152(b).

state communications, such as when it is not "possible to separate the interstate and intrastate portions of the asserted FCC regulation."[51]

19. In this particular instance, this test has been met. As discussed in detail above, it is impossible as a practical matter to separate the interstate and intrastate provision of BellSouth's voice mail service to permit effectuation of the Georgia *Order* only for the intrastate provision of the service. As indicated, application of the *Order* to the intrastate provision of the service will also "freeze" the interstate provision of the service.

20. Furthermore, we have recently instituted a comprehensive regulatory framework to govern provision of enhanced services by the BOCs.[52] That framework governs BOC provision of interstate enhanced services, including BellSouth's interstate voice mail service.[53] This regulatory approach to the regulatory framework, among several alternatives, that will best permit BOCs to make use of their substantial telecommunications resources to provide interstate enhanced services to the public, especially to the mass market. BellSouth provides its voice mail service under that regulatory framework, pursuant to a CEI plan approved by the Commission. The Georgia *Order*, however, "freezes" BellSouth's provision of any voice mail service to new customers until state safeguards are implemented, even if the service is provided under an FCC-approved CEI plan.[54] Because the Georgia *Order* bars provision of any voice mail service to new customers, it effectively establishes a state determination as to when the carrier may provide its interstate enhanced service and displaces the federal public interest determination providing for BOC provision of interstate enhanced services. Obviously, for as long as it remains in effect, the Georgia *Order* negates the federal permission to BellSouth to provide its interstate voice mail service. Accordingly, we find that the Georgia *Order* thwarts achievement of important federal objectives that were sought by our comprehensive regulatory framework governing BOC participation in the enhanced services marketplace.

21. We are generally reluctant to preempt state authority over intrastate communications. Whenever possible, we have sought to let proceedings at the state level move to completion if that may eliminate the need for preemption, especially where state proceedings are moving expeditiously.[55] In this case, eight months have elapsed since BellSouth filed its petition.[56] It is uncertain when proceedings will be concluded.[57]

III. CONCLUSION

22. As discussed above, the state order, as long as it remains in effect, thwarts achievement of the federal public interest objectives that led us to adopt our comprehensive regulatory framework governing BOC participation in the enhanced services marketplace. Accordingly, given the practical jurisdictional inseverability of BellSouth's voice mail service for purposes of implementing the state action here at issue, we preempt the Georgia PSC's "freeze" of BellSouth's offering of voice mail service. BellSouth may resume offering its voice mail service in Georgia to new customers upon the effective date of this *Memorandum Opinion and Order*.[58] Our decision here does not address any aspect of the Georgia PSC's proposed regulatory controls. We address only the Georgia *Order's* "freeze" of provision by BellSouth of its voice mail service offered in the state.

23. Accordingly, IT IS ORDERED, That the Petition for Emergency Relief and Declaratory Ruling filed by the BellSouth Corporation IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[51] *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 375 n.4 (1986). *See also Maryland Public Service Comm'n v. FCC*, 909 F.2d 1510 (D.C. Cir. 1990); *California v. FCC*, 905 F.2d 1217 (9th Cir. 1217); *Texas Public Utility Comm'n v. FCC*, 886 F.2d 1325, 1331 (D.C. Cir. 1989); *National Association of Regulatory Commissioners v. FCC*, 880 F.2d 422, 429 (D.C. Cir. 1989); *Illinois Bell Telephone Co. v. FCC*, 883 F.2d 104, 116 (D.C. Cir. 1989); *North Carolina Utilities Comm'n v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976); *North Carolina Utilities Comm'n v. FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977).

[52] *BOC Safeguards Order*, n.5, *supra*.

[53] In the *BOC Safeguards Order* we preempted state requirements for structural separation of facilities and personnel used to provide the intrastate portion of jurisdictionally mixed enhanced services, state CPNI rules requiring prior authorization that is not required by our rules, and state network disclosure rules that require initial disclosure at a time different from the federal rule. The Commission determined that these state requirements would thwart or impede the nonstructural safeguards pursuant to which AT&T, the BOCs, and the independents may provide interstate enhanced services and the federal goals that they are intended to achieve. The Commission declined to preempt state structural separation requirements pertaining to purely intrastate enhanced services and those requirements mandating only the establishment of separate corporations and separate books of account for the BOC provision of enhanced services. The Commission also declined to preempt state nonstructural regulations apart from those specific actions mentioned above.

[54] *Order* p. 48.

[55] *See, e.g., Atlantic Richfield Co.*, 3 FCC Rcd 3089 (1988), *aff'd Texas Public Utility Commission v. FCC*, 886 F.2d 1325 (D.C. Cir. 1989).

[56] The Georgia PSC has requested a cost study and other information from BellSouth. See Letters from B. B. Knowles, Director Utilities Division, Georgia Public Service Commission to Marty Dickens, Assistant Vice President, Southern Bell Telephone Company, June 27, 1991 and November 14, 1991. BellSouth contends that it has submitted to the Georgia PSC all nonproprietary cost information requested by the Georgia PSC and will submit proprietary cost information pursuant to an appropriate protective agreement or protective order. BellSouth Reply Comments at 39.

[57] It is also possible that the state may not lift the freeze even after completion of its proceeding. The Georgia *Order* states at one point that the Georgia PSC will "review" the freeze when state regulatory controls are implemented. *Order* at 71.

[58] Pursuant to Sections 1.103 and 1.4(b) of the Commission's rules, 47 C.F.R. Sections 1.103 and 1.4(b), this *Memorandum Opinion and Order* is effective upon release.

APPENDIX

PARTIES FILING COMMENTS IN THIS PROCEEDING

ADT Security Systems, Inc.
ATC
American Newspaper Publishers Association
Association of Telemessaging Services International*
Bell Atlantic
BellSouth***
BT North America Inc. **
California Bankers Clearing House Association
California Public Utilities Commission*
Central Telephone Company
CompuServe
Cox Enterprises, Inc.
District of Columbia Public Service Commission*
Florida Public Service Commission**
Georgia Public Service Commission
Information Industry Association
International Business Machines Corporation*
Kentucky Public Service Commission**
MCI*
MessagePhone, Inc.
National Association of Regulatory Utility Commissioners
New York Department of Public Services**
NYNEX Telephone Companies
Prodigy Services Company
Unisys Corporation
US Sprint Communications Co. Ltd.

* Filed both Initial and Reply Comments
** Filed Reply Comments only
*** Filed Petition and Reply Comments

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 91-280

In the Matter of

Request for Pioneer's	RM-7334 (PP-1)
Preference in Proceeding	RM-7399 (PP-2)
to Allocate Spectrum	RM-7612 (PP-3)
for Fixed and Mobile	
Satellite Services	
for Low-Earth Orbit Satellites	

TENTATIVE DECISION

Adopted: January 16, 1992; Released: February 11, 1992

Comment Date: March 30, 1992
Reply Comment Date: April 29, 1992

By the Commission:

I. INTRODUCTION

1. By this *Order*, we make an initial determination to grant a pioneer's preference to Volunteers in Technical Assistance (VITA) for a license to operate a low-Earth orbit (LEO) satellite communications system to provide data communications. The record, dating back to VITA's experimental license request on September 7, 1988, establishes that VITA was the first to develop and demonstrate the utility of a small LEO system using VHF frequencies for civilian communications purposes. We also make an initial determination to deny the requests for pioneer's preference filed by Orbital Communications Corporation (ORBCOMM) and STARSYS Inc. (STARSYS). Comments and reply comments will be accepted on the *Tentative Decision* as specified above, and a final decision will be issued concurrently with a *Report and Order* in this docket.

II. BACKGROUND

2. The Commission's pioneer's preference rules are intended to provide a license preference to applicants that propose an allocation for a new service, or a substantial enhancement to an existing service. On September 26, 1991, we adopted a *Notice of Proposed Rule Making* (*Notice*) to allocate spectrum for low-Earth orbit (LEO) satellites.[1] Although our rules provide for addressing requests for a pioneer's preference at the same time we adopt a notice of proposed rule making,[2] we deferred action to permit consideration of comments on the preference requests.[3] This was necessary because the preference rules became effective on July 30, 1991, which did not permit time before adoption of the *Notice* for preference requests to be filed, put on public notice, and comments and reply comments received and analyzed.[4]

III. DISCUSSION

3. VITA, ORBCOMM, and STARSYS are potential licensees in the proposed VHF/UHF-band LEO satellite service and each has applied for a pioneer's preference in that service.[5] VITA, a non-profit charitable organization based in the United States, provides a wide range of technical assistance services to individuals and groups in developing countries. VITA proposes to use two LEO satellites to facilitate the exchange of messages related to its provision of humanitarian assistance to persons in other countries. ORBCOMM is a commercial communications company and a separate subsidiary of the Orbital Sciences Corporation. STARSYS also is a commercial communications company. ORBCOMM and STARSYS each propose to provide commercial data messaging and position determination services to the public using 20 and 24 satellites, respectively. A number of parties filed responses or replies to these requests.[6]

4. *VITA's Request.* VITA submitted a request for pioneer's preference on August 16, 1991. VITA argues that its request is supported by years of research and development experience that culminated with its LEO proposal and that it developed advanced technology necessary to implement worldwide fixed-satellite service using LEOs at VHF and UHF frequencies. VITA states that it has been engaged in the design and construction of LEO packet data communications systems since the early 1980s, and that it has developed and built inexpensive earth stations and field units that automatically track, acquire, and communicate with its experimental spacecraft.[7] VITA further contends that its mesh network is superior to the gateway technology proposed by ORBCOMM and STARSYS, yet significantly less expensive.[8] Finally, VITA contends that

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[1] *Notice of Proposed Rule Making*, ET Docket No. 91-280, 6 FCC Rcd 5932 (1991).

[2] *See Report and Order*, GEN Docket No. 90-217, 6 FCC Rcd 3488 (1991), petitions for reconsideration pending, in which the Commission promulgated rules for providing a license preference to applicants that propose an allocation for a new service or a substantial enhancement to an existing service. *See also*, *Public Notice*, "Filing Requirements for Pioneer's Preference," GEN Docket No. 90-217, 6 FCC Rcd 3720 (1991). This *Tentative Decision* is subject to our action in the reconsideration proceeding in the pioneer's preference docket, *supra*.

[3] *See Notice*, *supra* note 1, at fn 7.

[4] *See Pioneer's Preference Requests Accepted for Filing*, Public Notice, mimeo No. 14825, released September 19, 1991.

[5] LEOSAT Corporation (LEOSAT) filed a license application to operate a LEO system, but has not filed a petition for rule making nor a request for pioneer's preference. LEOSAT is a commercial company that has developed a "smart car" technology for which it proposes to use LEOs in the VHF bands.

[6] The appendix contains a list of parties that filed comments or reply comments.

[7] *See* Application for Experimental License Authorization, File No. 00796-EX-PL-88, exhibit 3, submitted to the Commission by VITA on September 7, 1988. VITA describes its extensive work in pioneering LEO technology in this experimental license application.

[8] The VITA mesh system utilizes terminal to terminal communications rather than transfer through a hub or gateway. The

its proposed LEO satellite system is unique in that it is the only system designed to provide a large volume of data communications capability at low cost to people otherwise unserved that are located in remote and inaccessible geographic areas of the world.

5. VITA argues that it merits a pioneer's preference because it has developed technology, and proposed an authorization, for an innovative new service that will satisfy the communications needs of various users around the world. In addition, VITA contends that its proposal is unique in proposing the first noncommercial LEO satellite service intended for humanitarian purposes. Both ORBCOMM and STARSYS support VITA's request. ORBCOMM states that VITA devised its own proposal and selected a frequency plan to complement that of ORBCOMM. It states that those substantial efforts and the innovative work performed by VITA merit a pioneer's preference for the proposed non-commercial service. STARSYS also supports VITA's request, stating that VITA has advanced a frequency plan that would enable its system to operate compatibly with STARSYS' system.

6. *ORBCOMM'S Request.* ORBCOMM filed a request for pioneer's preference on May 23, 1991. ORBCOMM submits that it was the first to: file a petition for rule making to use LEOs for commercial two way mobile-satellite services for data messaging and position determination services; research use of the 137-138 and 148-149.9 MHz bands for implementing these new services; and propose using a constellation of LEO satellites to provide the mobile-satellite services on a 24-hour a day basis. ORBCOMM maintains that it pioneered the development of many technological advances that are necessary to implement these new services, including advances in communications equipment, launch facilities, and frequency coordination procedures.

7. ORBCOMM argues that its proposal is innovative, detailed, and for a service not currently available. In particular, ORBCOMM states that it has developed the new Pegasus air-launched space booster and the Dynamic Channel Activity Assignment System (DCAAS) that will allow the new LEO technology to be implemented.[9] In 1990, we issued ORBCOMM an experimental license to test its LEO system, but those tests have not yet been conducted.

8. A number of parties filed comments supporting ORBCOMM's request for a pioneer's preference. In particular, the Republic Group; Gova, Inc.; C.A. Telecommunications de Caracas; and Torrey Science & Technology Corporation agree that ORBCOMM should be awarded a preference because it was: 1) the first to file a rule making petition; 2) the first to propose provision of two-way communications both to and from commercial fixed and mobile terminals; 3) the first to propose use of the 137-138/148-149.9 MHz bands; and 4) the first to propose a constellation of satellites to provide LEO satellite services to users on a 24 hour-a-day basis. Norris Satellite Communications, Inc. also supports the ORBCOMM preference request, stating that ORBCOMM not only has developed new technology, but also has pioneered sharing criteria that promote compatibility with the terrestrial fixed and mobile services.

9. STARSYS opposes the ORBCOMM preference request. STARSYS claims that ORBCOMM has exaggerated its role in the development of the LEO technology that it proposes to incorporate into its system and also exaggerates the extent to which its proposed service would be spectrum efficient. STARSYS argues that ORBCOMM principally has pioneered rocket developments rather than communications-related technology, and that it was STARSYS affiliates that developed LEO operating technology, such as the algorithms to utilize Doppler effects for positioning on the Argos satellite system.[10] According to STARSYS, ORBCOMM merely has incorporated existing capabilities into its proposal. STARSYS further argues that ORBCOMM's DCAAS system for providing network command and control is not a new and novel development, but rather is merely the well-known technique of frequency hopping. STARSYS maintains that its code division multiple access (CDMA) approach is more spectrum efficient than ORBCOMM's frequency division multiple access (FDMA) approach.

10. *STARSYS' Request.* STARSYS filed its request for a pioneer's preference on July 30, 1991. STARSYS states that its proposed LEO system is a substantial enhancement to communications technology. STARSYS argues that its proposal to establish a commercial LEO service using spread spectrum CDMA modulation promotes multiple entry and satisfies the Commission's eligibility criteria for a pioneer's preference. STARSYS states that it will apply the expertise of North American CLS, Inc. -- a corporate affiliate -- to develop, construct, and launch a very spectrum efficient LEO satellite system. It also contends that this affiliated company was the first commercial entity to develop LEO technology and as such is a pioneer in proposing a service not currently provided. STARSYS claims that its LEO system will constitute a highly efficient new and innovative use of the spectrum.

11. ORBCOMM objects to the award of a pioneer's preference to STARSYS. ORBCOMM claims that its own work involves innovative development of commercial, two-way communications services using LEOs while STARSYS relies on the work of its affiliate company North American CLS with respect to the Argos system. ORBCOMM further maintains that since the French Government and the National Aeronautics and Space Administration (NASA) funded the Argos work, it should not be used to reward any alleged contribution by STARSYS. ORBCOMM argues not only that a pioneer's preference to STARSYS would be inappropriate, but also that foreign governmental ownership by STARSYS would prevent it from obtaining a license under the Communications Act even as a private carrier.[11]

12. *Procedural Opposition.* LEOSAT Corporation (LEOSAT) opposes all three requests for a pioneer's preference. LEOSAT contends that the cut-off notice for small LEO applications[12] acts as a *de facto* NPRM and

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simplicity of terminal to terminal access over a gateway system demonstrates VITA's effort to provide its service in an inexpensive and streamlined manner.

[9] DCAAS is the system that ORBCOMM developed to provide network command and control.

[10] The Argos system is a government LEO position determination system that is used for search and rescue operations.

[11] *See* 47 U.S.C. § 310(a). This section states: "The station license required under this Act shall not be granted to or held by any foreign government or the representative thereof".

[12] *See* Public Notice, released July 16, 1990, DA 90-918.

forecloses the Commission from granting a pioneer's preference to any party.[13] LEOSAT specifically contends that the Commission cannot permit ORBCOMM, STARSYS, or VITA to apply for a pioneer's preference that would lead to grant of a license without consideration of the competing applications that were filed in response to the cut-off notice, and thereby exclude others from being licensed to provide service. It further argues that the nationwide preference request made by ORBCOMM is inconsistent with our pioneer's preference policy.[14]

13. *Decision.* When considering award of a pioneer's preference, we analyze whether the applicant "proposes to provide either a service not currently provided or a substantial enhancement to an existing service."[15] This standard can be met by developing new technology that is useful or necessary to the provision of a new radio-based service or that incorporates a significant enhancement or capability within an existing service. The factors to be considered include, but are not limited to, added functionality, new use of the spectrum, changed operating or technical characteristics, increased spectrum efficiency, increased speed or quality of information transfer, and reduced cost to the public.[16] We reiterate our position in the pioneer's preference *Report and Order* that we do not intend to grant preference requests casually, but rather, that each applicant has a significant burden to persuade us that its proposal is innovative, has merit, and that the applicant is the original developer or proponent of the innovation at issue. We also emphasize again that we do not intend to award a pioneer preference that would bestow a nationwide monopoly.[17]

14. We considered a number of policy and factual issues in determining which, if any, of the requests before us merits grant of a pioneer's preference. First, we applied the basic eligibility criteria to each proposal. These include: (1) whether the applicant has demonstrated that its proposal is technologically innovative, and (2) whether the innovation reasonably will lead to establishment of a service not currently provided or will substantially enhance an existing service. Second, we evaluated the extent to which any experiments conducted by the proponent or other detailed technical submission demonstrate the viability of its proposal.

15. After review and analysis of the facts and arguments presented, we have made an initial decision to grant VITA's request for a preference and deny the requests of ORBCOMM and STARSYS. VITA clearly was the first both to develop LEO data communications technology and to experiment with the operation of an actual LEO system to support data communications in the VHF spectrum. The VITA LEO satellite system as designed would use 19.2 kHz channels to provide reliable, low-cost packet data communications services at 9600 bits per second between ground stations located anywhere in the world. Unlike existing geostationary satellite systems and other LEO communications systems concepts proposed to date, the VITA system will support direct terminal-to-terminal network operations between ground stations via the LEO satellite system in a simple and inexpensive scheme without the use of a large expensive hub or gateway as proposed by ORBCOMM and STARSYS. The VITA system will allow near real time connection between ground stations located within approximately 2600 miles of each other.

16. VITA first filed a request for experimental authority for a LEO system in the VHF frequency range in 1988, well before either ORBCOMM or STARSYS. Even before its filing with us, earlier in the 1980's, VITA initiated experiments with communications technologies to evaluate the possibility of enhancing the capabilities and reducing the costs of global communications. VITA, with the Radio Amateur Satellite Corporation, designed and constructed a rudimentary satellite packet radio package that was launched in March 1984 aboard a scientific satellite built by the University of Surrey in Guilford, England. The test was successful, and VITA built upon the experiment's success by developing a more advanced system. It applied to this Commission in 1988 for an experimental license for a ground station to serve that more advanced system.[18] Thus, VITA actually has operated an experimental LEO communications system.[19] These facts establish that VITA pioneered use of loworbit satellites for civilian data communications at VHF frequencies. For these reasons we conclude that a pioneer's preference to VITA is warranted.

17. In analyzing ORBCOMM's pioneer's preference request, we conclude that the information ORBCOMM submitted fails to justify a pioneer's preference. ORBCOMM fails to meet its burden to demonstrate an innovation beyond existing communications technology. Many of the technical achievements that ORBCOMM argues are justification for a pioneer's preference are relatively routine design features that most new LEO satellite licensees would be expected to accomplish. For example, planning a frequency coordination scheme and designing technical parameters and system components are actions that would be a necessary component of almost any LEO satellite operation. As to whatever advances in launch technology for which ORBCOMM may be responsible, we agree with STARSYS that ORBCOMM's developments in this field are not within the class of innovations in new communications systems and services for which this Commission will grant a pioneer's preference for a radio license. While we recognize that ORBCOMM was the first to file a petition for rule making and a request for pioneer's preference in this proceeding, the proceeding already was in progress when our pioneer's preference rules went into effect.[20] Therefore, all three requests have been considered

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[13] *See Report and Order* and *Public Notice*, *supra* note 2. The *Report and Order* at para. 70 states that "... preference requests will be accepted except where an NPRM has already been issued proposing rules for a new service or modifications to rules in an existing service."

[14] On December 5, 1991, after all comment deadlines had expired, LEOSAT also filed a response to the ORBCOMM reply comment in which LEOSAT repeats its argument that the Commission by rule making is attempting to deny the competing application rights it created by the "cut-off" notice, citing *Ashbacker v. FCC*, 326 U.S. 327 (1945).

[15] *See Report and Order*, *supra* note 2 at para. 49.

[16] *Id.* at para. 48.

[17] *Id.* at para. 19.

[18] *See VITA experimental license application*, *supra* note 7. VITA proposed using for its experiments an existing satellite that had been authorized by the United Kingdom. The experimental license authorizing VITA to operate earth stations using this LEO satellite was granted on February 6, 1989.

[19] ORBCOMM has held an experimental license since 1990. STARSYS filed for an experimental license in 1991.

[20] *See Report and Order*, *supra* note 2.

as if they were filed concomitantly. Finally, ORBCOMM's consideration of the VHF spectrum for LEO communications was preceded by VITA's consideration of the same spectrum range for the same purpose.

18. For similar reasons we conclude that the information submitted by STARSYS also fails to meet our standard for innovation. Its development of the Argos satellite system does not demonstrate an innovative contribution toward advancing a commercial LEO communications system. We are unable to discern any unique or innovative contribution by STARSYS with respect to the spread spectrum technology it proposes to use. Finally, STARSYS' proposal clearly was preceded by the earlier VITA effort.[21] ORBCOMM alleges that STARSYS is not independent of the French Government. Therefore, if we had determined that STARSYS met the criteria for a pioneer's preference, we then would need to address whether § 310(a) of the Communications Act bars STARSYS from being a licensee.

19. We disagree with LEOSAT's claim that the Commission is foreclosed from implementing a pioneer's preference in this proceeding because of timing considerations. The public notice referenced by LEOSAT is a notice of applications that are "cutoff" for public comment and for the filing of mutually exclusive proposals. The public notice in question is not a *de facto* NPRM and has no effect upon either the LEO rule making or this pioneer's preference proceeding. Future action on those applications already is dependent upon completion of this rule making proceeding to allocate spectrum for LEO service and the attendant pioneer's preference determination.[22] If the Commission later selects from among the license applicants using comparative hearings, lotteries, or some other means, that action will be separate from its award of a preference and will involve those applicants with license applications found acceptable, excluding any applicant that has been awarded a pioneer's preference. However, it should be noted that this decision does not grant a license to VITA, but only a preference in the license process. A final determination on whether to allocate spectrum for "small" LEOs and consideration of VITA's eligibility to be a licensee must be made before issuance of any license.

20. *Ex Parte Rules.* This is a restricted proceeding. No *ex parte* presentations are permitted from the time the Commission adopts this *Tentative Decision* and requests comments until the proceeding has been finalized or until such decision or approval is no longer subject to reconsideration by the Commission or review by any court. In addition, no presentation, *ex parte* or otherwise, is permitted during the Sunshine Agenda period. *See generally* 47 C.F.R. Sections 1.1202, 1.1203, and 1.1208.

21. Pursuant to applicable procedures set forth at 47 C.F.R. Sections 1.415 and 1.419, of the Commission's Rules, interested parties may file comments on or before **March 30, 1992,** and reply comments on or before **April 29, 1992.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

22. Accordingly, IT IS ORDERED THAT the pioneer's preference request of VITA IS GRANTED and THAT the pioneer's preference requests of ORBCOMM and STARSYS ARE DENIED.[23]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Parties Filing Comments in RM-7334 (PP-1):

C.A. La Electricidad de Caracas
Ellipsat Corporation
GOVA, Inc.
International Marine Industries
LEOSAT Corporation
Norris Satellite Communications, Inc.
Satlantic Inc.
STARSYS Global Positioning, Inc. (STARSYS)
The Republic Group
Torrey Science & Technology Corporation
Volunteers in Technical Assistance (VITA)

[21] We are denying the STARSYS request for a pioneer's preference based upon the merits. However, we note that ORBCOMM raises an issue of foreign government ownership against STARSYS.

[22] LEOSAT's argument that award of a pioneer's preference is foreclosed by the Supreme Court's mandate in *Ashbacker v. FCC, supra,* is unpersuasive. Adoption of a spectrum allocation for small LEOs, which under our rules includes consideration of a pioneer's preference, is an obvious condition predicate to consideration of *any* of the applications for a small LEO license. As recognized by the Supreme Court in a later case interpreting *Ashbacker,* the Commission by rule making may adopt threshold eligibility criteria that affect pending applications if it determines that such rules serve the public interest. *See U.S. v. Storer Broadcasting,* 351 US 192 (1956). That is precisely what the Commission did in the pioneer's preference proceeding. *See Report and Order, supra* note 2 at paras. 32-33.

[23] Pursuant to 47 C.F.R. Section 1.402(b), these are initial determinations. Final determinations will be made when a report and order is adopted in this docket.

Parties Filing Comments in RM-7399 (PP-2):

Ellipsat Corporation
LEOSAT Corporation
Orbital Communications Corporation (ORBCOMM)
Volunteers in Technical Assistance (VITA)

Parties Filing Comments in RM-7612 (PP-3):

Ellipsat Corporation
LEOSAT Corporation
Orbital Communications Corporation (ORBCOMM)
STARSYS Global Positioning, Inc. (STARSYS)

Parties Filing Reply Comments in RM-7334 (PP-1):

Orbital Communications Corporation (ORBCOMM)
STARSYS Global Positioning, Inc. (STARSYS)
TELESAT Canada

Parties Filing Reply Comments in RM-7399 (PP-2):

STARSYS Global Positioning, Inc. (STARSYS)

Parties Filing Reply Comments in RM-7612 (PP-3):

Volunteers in Technical Assistance (VITA)

Parties Filing Late Comments in RM-7334 (PP-1):

LEOSAT Corporation

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 91-2

In the Matter of

Amendment of Parts 0, 1, 2, and 95 of the Commission's Rules to Provide Interactive Video and Data Services — RM-6196

REPORT AND ORDER

Adopted: January 16, 1992; Released: February 13, 1992

By the Commission:

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INTRODUCTION

1. By this action, the Commission establishes an interactive video and data service (IVDS) and allocates spectrum for its use. This action will make available to the public a variety of radio-based interactive services. We believe that this allocation of radio spectrum is warranted in order to permit development of a convenient, low-cost system that provides two-way interaction with commercial and educational programming, along with informational and data services that may be delivered by, and coordinated with, broadcast television, cable television, wireless cable, direct broadcast satellite, or any future television delivery methods.

BACKGROUND

2. On December 2, 1987, TV Answer, Inc. (TV Answer) filed a Petition for Rule Making requesting an allocation of spectrum for the provision of interactive video and data services. TV Answer has developed technology designed to provide virtual real-time viewer response to educational and pay-per-view programming, as well as other commercial data applications such as home shopping and home banking. Additionally, it proposes to offer downloading of data that would provide up-to-date television program listings, video catalogs, educational texts, and future consumer data applications.

3. In response to TV Answer's original petition, and its subsequent filings that refined the technical aspects of its proposed system, the Commission released a *Notice of Proposed Rule Making* (*Notice*) on March 4, 1991.[1] In that *Notice*, we proposed: 1) to allocate spectrum in the frequency segment 218-218.5 MHz for IVDS, 2) to establish technical rules for the service, and 3) to promulgate regulatory and service rules establishing service areas and markets, licensing procedures, and construction benchmarks. We also solicited alternative proposals with regard to the amount of spectrum needed, alternative IVDS technologies, regulatory policies, and service rules.

DISCUSSION

4. After reviewing the record in this proceeding, we conclude that a consumer interactive service would serve the public interest. IVDS potentially can provide a multitude of services, offering alternative means for interactive television polling, home shopping, educational programming, access to information services, and other consumer-oriented two-way services. We also conclude that an allocation at 218-219 MHz will only minimally affect the existing services that are currently eligible to use, or that abut, these frequencies.

Spectrum Allocation

5. In the *Notice* we tentatively concluded that, with proper engineering and design, frequencies in the 218-219 MHz band could be used for IVDS without disruption or interference to TV Channel 13 television operations in the lower adjacent band, or to maritime operations on other frequencies within the 216-220 MHz band. Based on this conclusion, we tentatively proposed to allocate for IVDS use 500 kHz in the lower half of the 218-219 MHz band, from 218-218.5 MHz, as requested by TV Answer. Comment was requested on whether it would be more desirable to allocate the 218.5-219.0 MHz band, or to expand the allocation to include the entire 218-219 MHz band. The 218-219 MHz band currently is allocated for use by the Group C and D ship stations in the Automated Maritime Telecommunications System (AMTS).[2]

6. *Comments.* The majority of commenters support a spectrum allocation for IVDS use. However, their views differ with respect to the amount of spectrum that we should allocate and the location of that allocation within the 218-219 MHz band. Several commenters suggest that

[1] *See Notice of Proposed Rule Making*, (*Notice*), 6 FCC Rcd 1368 (1991).

[2] AMTS is an integrated and interconnected maritime communications system serving ship stations and offshore fixed platforms. The AMTS band, 216-220 MHz, is divided into four groups of twenty 25 kHz paired coast and ship station channels: Group A, Group B, Group C, and Group D. *See* 47 CFR Section 80.475.

the upper half, instead of the lower half, of the 218-219 MHz band be allocated in order to minimize potential interference to TV Channel 13. Other supporters suggest that the Commission's proposal to allocate 500 kHz be expanded to a 750 kHz or 1 MHz allocation. Parties that oppose allocating spectrum for IVDS maintain that the existing maritime mobile allocation in the 216-220 MHz band should be retained and argue that alternate means of interacting with television programming obviate the need for an IVDS spectrum allocation.[3]

7. The Association for Maximum Service Television, Inc. (MSTV) supports the Commission's alternative allocation of the 218.5-219 MHz band for IVDS. MSTV contends that the additional frequency spacing that this allocation would afford TV Channel 13 operations would make television receivers tuned to TV Channel 13 less susceptible to interference by IVDS transmissions. The National Association of Broadcasters (NAB) also favors an IVDS allocation in the upper half of the 218-219 MHz band for the same reason.[4] Both NAB and MSTV state that allocating more than 500 kHz of spectrum for IVDS would be premature.[5]

8. Television broadcast stations also are potential users of IVDS technology and services. KCOP Television, Inc. (KCOP), licensee of channel 13 in Los Angeles, along with other broadcast interests, expresses support for the development of IVDS, but favors the alternate allocation of 218.5219 MHz to reduce the possibility of interference. KCOP additionally notes that 218.5-219 MHz, allocated to the Group C AMTS ship station channels, is unused due to technical limitations that preclude AMTS use in many areas and is, therefore, appropriate for IVDS.[6]

9. Other parties argue for an IVDS allocation larger than 500 kHz, contending that 500 kHz would be insufficient for successful and competitive operation of IVDS systems. TV Answer, for example, states that while a minimum of 500 kHz is necessary for operation of its system, allocation of a full megahertz would serve the public interest in fostering competition by allowing two licensees per license area. Thus, TV Answer favors allocation of one megahertz of spectrum, from 218-219 MHz, with 500 kHz to be assigned to each of two licensees. Radio Telecom and Technology (RTT), a company proposing an alternative IVDS technology, also contends that 500 kHz is insufficient for accommodating competitive IVDS technology and service providers.

10. Educational television interests express concern that the Commission's proposal contemplating two commercial IVDS systems per license area would provide insufficient access for public service applications. While they offer several alternatives, their preferred solution is to divide the 218-219 MHz band into segments, 250 kHz of which would be reserved solely for non-commercial public service IVDS applications.[7] Some of these commenters also request that the Commission allocate additional spectrum outside the 218-219 MHz band, or in some other way guarantee non-commercial public access to IVDS capacity.[8]

11. The primary opposition to an IVDS spectrum allocation in the 218-219 MHz band originates with the maritime interests. Waterway Communications, Inc. (Watercom), which is licensed to operate on the Group A and B AMTS channels[9] in certain geographical areas, argues that the Commission failed in the *Notice* to consider the communications needs of the maritime community. Watercom states that this spectrum is needed by AMTS to eliminate blocking experienced at certain AMTS shore stations and to provide for future growth.[10] Further, Watercom contrasts the Commission's IVDS proposal with its proposal to the 1979 World Administrative Radio Conference (79 WARC), calling for allocating 9 MHz of VHF spectrum for the maritime mobile service, and with its subsequent rulemaking that implemented the current maritime allocation in the 216-220 MHz band.[11] It also charges that no need for IVDS has been demonstrated,[12] and that the TV Answer system has unresolved technical deficiencies.[13] Watercom concludes that no allocation is warranted for IVDS and that if the 500 kHz requested is not warranted, then the Commission's alternate proposal to allocate a full megahertz of spectrum certainly is unjustified.[14] The Radio Technical Commission for Maritme Services is in agreement with Watercom.[15]

12. In response to Watercom's argument that additional frequencies are now needed for AMTS, TV Answer commissioned an independent monitoring of Watercom's use of its assigned Group A and B frequencies.[16] TV Answer, based on its independent study, concludes that AMTS traffic has changed little since a similar study conducted in 1989, and that Watercom uses no more than eight of the forty channels assigned to it at any of its 55 AMTS locations.[17]

13. *Decision.* In the *Notice*, we stated that IVDS holds promise as a means of extending interactive services for both commercial and educational purposes to every household in the country. The record contains significant support for this conclusion. Thus, we continue to believe that greater public benefit will result from allocating spectrum in the 218-219 MHz band for IVDS, than by releasing the currently unused AMTS Group C and D channels for possible use by maritime interests. In addition, IVDS will provide service in spectrum that is technically unsuitable for many other services -- including AMTS -- because of its proximity to TV Channel 13. An IVDS allocation will also further the Commission's goals of encouraging the development of innovative communications services

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[3] Those parties cite alternate means such as wireline services and failed two-way cable attempts. *See* United States Telephone Association reply comments.

[4] NAB comments at 8.

[5] MSTV comments at 3; and NAB comments at 9.

[6] KCOP comments at 10.

[7] Public Service Parties comments at 13.

[8] CTW comments at 20; CPB comments at 16-17; and EBC comments at 8.

[9] *See* footnote 2, *supra*.

[10] Watercom comments at 12.

[11] Watercom comments at 3-4.

[12] *Id*, at 13.

[13] Watercom reply comments at 9-13.

[14] Watercom comments at 13-25.

[15] There are numerous additional comments filed by maritime interests opposing an IVDS allocation. The majority are single page letters, filed by users of Watercom's service, that appear to be form letters whose authors are under the false impression that the Commission is proposing to reallocate the AMTS frequencies currently in use.

[16] TV Answer reply comments at appendix.

[17] *See* Further Reply Comments of TV Answer, Inc. at 5, and at Exhibit 2, page 14 (November 27, 1991).

and promoting efficient use of the electromagnetic spectrum. The majority of commenters agree with our conclusion.

14. We have reached this decision after carefully considering its potential impact on AMTS service and, in particular, on Watercom, which currently is the only AMTS service provider. First, we recognize that communication needs and consumer demand for communication services evolve over time. Technology permits spectrum uses that were not available in 1979, such as cellular radio and Specialized Mobile Radio (SMR) services. These services now meet some of the maritime community's communication requirements. In addition, Watercom has not provided persuasive evidence that it has exceeded the capacity of the 40 Group A and B AMTS frequencies for which it is licensed, and therefore requires expansion into the Group C or D frequencies.[18] Therefore, it appears that the demand for AMTS service has not developed as originally envisioned and that maritime communication needs can be accommodated satisfactorily in the spectrum remaining for AMTS use. In particular, we note that even if additional communications capacity is required for AMTS, there are alternatives such as more efficient digital modulation techniques and channel splitting that can be employed to meet this increased demand.

15. Further, with regard to the AMTS service, the Commission noted at the inception of GEN Docket No. 88-372 that TV Answer had filed a petition to use a portion of unused AMTS spectrum (Group C and D AMTS ship station channels) for IVDS. Although the Commission proposed to relax the mileage restrictions on the use of those frequencies, it stated that the TV Answer petition would be considered concurrently.[19] In the *First Report and Order* in GEN Docket No. 88-372, the Commission concluded that the mileage restrictions on the Group C and D AMTS frequencies could be relaxed;[20] however, it delayed permitting use of the Group C and D frequencies until conclusion of the instant proceeding.[21] In order to meet future AMTS needs, the Commission allowed nationwide use of the geographically restricted Group A and B frequencies.[22] Accordingly, the needs of the AMTS service were considered fully in GEN Docket No. 88-372, and our decision today is consistent with the actions taken in that proceeding.[23]

16. We also have thoroughly evaluated the issue of interference to TV Channel 13. We acknowledge that allocating spectrum only at 218.5-219 MHz would provide additional interference protection to TV Channel 13. However, in the *Notice*, we also clearly indicated that we were considering an allocation at 218-218.5 MHz partly in response to developments that occurred during the original comment period associated with TV Answer's rulemaking petition. That proposal and the associated technical requirements were based on an understanding between TV Answer and the Association For Maximum Service Television (MSTV) that IVDS and TV Channel 13 operations could coexist with IVDS using 218-218.5 MHz.[24] Referring to technical modifications that TV Answer had filed, MSTV stated that "|M|STV believes that the latest proposals of TV Answer, if properly codified, would provide protection to TV Channel 13 viewers and stations sufficient to permit the spectrum allocation TV Answer seeks."[25] We concur with TV Answer and MSTV that TV Answer's proposal would permit an IVDS allocation in the 218-218.5 MHz band. If adequate protection could be provided to TV Channel 13 operations by IVDS operating at 218-218.5 MHz, then IVDS operations at 218.5-219 MHz would pose even less of a threat. Therefore, we conclude that interference concerns with respect to TV Channel 13 do not preclude us from allocating any or all spectrum in the 218-219 MHz band.[26]

17. In order to provide for competition in each IVDS market, to allow competing IVDS technologies to operate as effectively as their designers intended, and to provide sufficient capacity for the various services envisioned by commenters in this proceeding, adequate spectrum must be allocated. TV Answer has stressed continuously that it needs a minimum of 500 kHz to accommodate the system it has already designed. TV Answer states that, in a given market, the number of channels that two 500 kHz segments would provide would allow for proper frequency coordination and market coverage among competing providers using its technology. RTT, which contends that its technology could use the entire 216-220 MHz band with-

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[18] Although Watercom disagrees with TV Answer's findings, it did not present conclusive data that would cause us to find differently. *See* Watercom Analysis of TV Answer Monitoring of AMTS Band (September 16, 1991).

[19] *See Notice of Proposed Rule Making*, GEN Docket No. 88-372, 3 FCC Rcd 4736 (1988), at paras. 7 and 15.

[20] *See First Report and Order*, GEN Docket No. 88-372, 6 FCC Rcd 437 (1991), at para. 19, at which it is noted that the Commission's conclusion was that subjecting the Group C and D frequencies to the same interference to TV reception criteria as the Group A and B channels would not increase the risk of interference. The Commission did not infer that it would be possible, on the Group C and D AMTS channels, to build a viable AMTS system that would provide the requisite protection to TV reception and still meet the AMTS 60 percent coverage rule (*see* 47 CFR Section 80.475 (b)).

[21] *See First Report and Order*, *supra* at paras. 2 and 19.

[22] It should be pointed out that Watercom's petition that resulted in GEN Docket No. 88-372 addressed whether the basis of certain restrictive AMTS rules should be reexamined (*see* Petition for Rule Making of Waterway Communications, Inc., Public Notice Report No. 1640, January 30, 1987). That petition is not based on a requirement for additional spectrum. Neither Watercom nor any other party has demonstrated that spectrum beyond the expanded Group A and B frequencies is required.

[23] There are several options available should the Group A and B channels become congested in the future. For example, AMTS operators could employ technologies that result in more efficient use of the existing frequencies. In addition, the Commission has allocated spectrum for generic mobile satellite services (MSS) and has proposed to allocate additional spectrum for MSS (*See Report and Order*, GEN Docket Nos. 84-1231, 84-1233, and 84-1234, 2 FCC Rcd 1825 (1986) that provides potential capacity for a similar service; *see also Notice of Proposed Rule Making*, GEN Docket No. 90-56, 5 FCC Rcd 1255 (1990)). MSS would almost certainly offer its various services to the maritime community. Further, in many areas cellular telephone service is also available for use by the maritime community.

[24] *See*, TV Answer, Inc. reply comments (July 13, 1990), and of MSTV comments (July 30, 1990), concerning technical amendments filed by TV Answer's in RM-6196.

[25] MSTV comments (July 30, 1990) at 1.

[26] In addition, we are adopting stringent interference rules to ensure that TV Channel 13 signals are further protected. *See* paras. 45-51 *infra; see also* new § 95.861, *infra*, Appendix A.

out causing perceptible interference to TV Channel 13, suggested an allocation of 2 MHz, but, as a minimum, currently requests at least 400 kHz.[27] In addition, potential IVDS applications have expanded to include many services not envisioned originally.[28] Accordingly, limiting IVDS to two 250 kHz segments might inhibit the full development of IVDS technology, slow the introduction of service and thwart the emergence of competitive providers of IVDS offerings.

18. We thus believe that allocating the entire 218-219 MHz band for this service is in the public interest. As stated by the many supporting parties, IVDS has many potential applications that could have wide ranging consumer appeal and creative educational use. In addition, this service has the potential to reach every television household in the United States. Conversely, AMTS service serves a much more restricted group, mainly commercial maritime entities. Further, unlike AMTS operation on Group C and D frequencies, IVDS, with its much lower signal levels, can more effectively use the spectrum without causing interference to television operations. Given the choice of maintaining the current Group C and D AMTS allocation that might not be implemented, even with removal of mileage restrictions, or allocating spectrum for IVDS, we believe that the public interest is best served by allocating 218-219 MHz to IVDS.

19. Educational and public service entities express concern that allocating only 500 kHz for two IVDS providers could leave little capacity for non-commercial applications. Their preferred solution is to set aside specific IVDS spectrum for non-commercial public service applications. We believe that educational interests should have access to IVDS systems and, indeed, that interactive technology has promising educational potential. However, we believe the better course is to allocate sufficient spectrum for a competitive market structure and for full development of a wide range of services, including educational applications. Thus, we feel that it would be premature to set aside spectrum for specific uses. Therefore, we will not reserve IDVS spectrum solely for non-commercial use. We do, however, encourage future IVDS licensees to make reasonable provision for educational and public service applications.

20. Finally, because our decision is necessarily based on prediction, we also note that we could initiate a reallocation proceeding in the future if the demand that we anticipate for interactive video and data services does not materialize. As noted, existing AMTS users and IVDS proponents disagree about the need to allocate the entire 1 MHz to IVDS. We intend to observe the development of IVDS and the future growth of AMTS to ensure that the public interest associated with these competing uses is adequately served. If necessary, we will not hesitate to reclaim part of the 218-219 MHz band if IVDS proves to be underused and AMTS, even after deploying more spectrally efficient technology, generates demand that overwhelms the capabilities of the 3 MHz of spectrum that remains allocated for the service.

Operational Requirements

21. As we stated in the *Notice*, technical requirements for IVDS must be designed to ensure that harmful interference is not caused to TV Channel 13 operations in the nearby 210-216 MHz band and to adjacent AMTS operations. Another consideration is that technical rules be sufficiently flexible to allow alternative IVDS technologies. For the most part, the technical limitations we proposed in the *Notice* were based on TV Answer's revised system design and interference prevention proposals.

22. Interactive Systems, Inc. (ISI) requests that we do nothing that might lead to the establishment of any interactive system as the *de jure* or *de facto* standard.[29] Similarly, RTT states that technical rules should be flexible and open to new ideas and innovations.[30] Vision Integrated Marketing suggests we provide a forum for the creation of standards that allow the industry to develop alternative IVDS technologies.[31] Other parties commenting on technical standards suggest specific changes to our proposed rules.

23. After considering the comments pertaining to specific technical parameters, and our own analysis,[32] we are modifying our original technical proposals as discussed below. Our revised technical requirements will reduce the potential for interference to adjacent services, while being sufficiently flexible to allow alternative technologies. In addition, we are requiring that every cell transmitter station (CTS) and response transmitter unit (RTU) be type-accepted for use in the IVDS in accordance with Subpart J of Part 2 of the Commission's Rules and the technical standards specified in this subpart.

24. *CTS Power.* We proposed limiting the effective radiated power (ERP) of an IVDS CTS and RTU to the minimum ERP necessary for successful two-way communication, but in any event not to exceed 20 watts. We also proposed, in the text of the *Notice*, to require automatic control of RTU power level by the CTS. For an IVDS system located in a TV Channel 13 service area, additional CTS operating limitations were proposed.[33]

25. *Comments.* TV Answer supports the proposed ERP limits of the *Notice*, although it claims that under many circumstances even higher maximum ERPs could be used without causing objectionable interference to TV Channel 13 operations.[34] MSTV states that its analysis indicates that while the proposed power levels would adequately protect TV Channel 13 operations, the signal strengths of both TV and IVDS might deviate substantially within a given service area due to variations in terrain and other obstacles. MSTV further argues that since IVDS signals are expected to emanate from multiple transmitters, there is a greater potential for interference from IVDS base stations than predicted levels indicate.[35] Other broadcasters also

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[27] Comments of RTT at 8 and Technical Statement of RTT at 4.

[28] For example, the Public Service Parties request that spectrum for non-commercial use be set aside for use such as providing a means for interactivity in a school system, *see* Public Service Party comments at 11-13.

[29] Interactive Systems, Inc. comments at 2.

[30] RTT's comments at 9.

[31] Vision Integrated Marketing comments at 1.

[32] *See* "Test Report, TV Answer Interference Tests," Project Number 91-10, Office of Engineering and Technology, January 10, 1991, placed in the record in this proceeding for informational purposes.

[33] *See Notice* at para. 14.

[34] TV Answer reply comments at 14.

[35] MSTV comments at 4.

express fear that an IVDS system operating at the maximum power levels will interfere with TV Channel 13 transmissions.[36] Consequently, a number of broadcaster interests, including MSTV, propose that we use the measured TV signal strength to determine the maximum power to authorize a specific IVDS system[37] or, in the alternative, that we authorize a much lower maximum power.[38] In addition, Thomson Consumer Electronics argues that operation of IVDS in-home units at the proposed maximum power levels would interfere with operation of consumer electrical and electronic equipment, other than television receivers, commonly found in the home.[39]

26. *Decision.* We continue to find that the predicted grade B signal contour of the Channel 13 TV station[40] is the most appropriate basis for determining the maximum power levels for IVDS CTSs.[41] In most other services the Commission relies on predicted rather than measured field strengths in determining interference potential.[42] The ERP proposals in the *Notice* were based upon supplemental filings made by TV Answer that relied upon predicted TV Channel 13 signal contours to calculate its revised ERP limits.[43] MSTV, in responding to those revisions, stated that "[T]V Answer and MSTV have worked constructively to resolve the serious interference questions raised by TV Answer's initial proposal and analyses;"[44] and that "[M]STV believes that these latest proposals of TV Answer, if properly codified, would provide protection to TV Channel 13 viewers and stations sufficient to permit the spectrum allocation TV Answer seeks."[45] Those commenters arguing that our proposed power levels either are too high, or that authorized CTS power levels should be based on actual measurements of TV Channel 13 signals, fail to provide technical analyses with alternative power limits which we could compare to those mutually agreed upon by TV Answer and MSTV. In addition, we note that measured field strength values can vary substantially over time and under changing environmental conditions, and therefore we conclude that using actual rather than predicted field strength to determine base station power limits would be unreliable and unnecessarily burden both IVDS licensees and the Commission. Further, our overall requirement that an IVDS licensee investigate complaints regarding interference to local television reception and, if it is determined that transmitters of the IVDS system are at fault, correct that interference or cease operating the offending IVDS CTS or RTU units, will resolve interference in those situations in which actual operating conditions result in signal levels different from those predicted that lead to harmful interference. Accordingly, we are adopting our proposal to limit the maximum ERP for a CTS to 20 watts and to require automatic power control as shown in attached Section 95.855.

27. With regard to Thomson's concern about interference to the operation of other electrical and electronic equipment typically found in locations where a RTU would be located, we find that this concern is addressed under the requirements contained in Part 15 of our Rules.[46] We fail to discern any utility in adopting special interference rules for IVDS systems.

28. *CTS Antenna Height.* We proposed requiring that the CTS antenna be no higher than necessary to assure adequate service and that in no case would the maximum antenna height above average terrain (HAAT) be permitted to exceed 120 feet (36.6 meters) when the antenna is located 10 miles or less outside of the Grade B contour of a TV Channel 13 station.

29. *Comments.* TV Answer states that given the power limitations proposed, the proposed CTS antenna height limit is unnecessary.[47] On the other hand, MSTV and other commenters concerned with IVDS interference potential to TV Channel 13 reception support the HAAT limitation proposed in the *Notice*.[48]

30. *Decision.* The antenna height limit was part of the revisions TV Answer made to its original proposal to address potential interference to TV Channel 13 reception. That limitation, in association with our adopted power limits, will help to ensure that IVDS signal levels remain sufficiently low to reduce the potential for interference to TV Channel 13 reception. Therefore, we will adopt a general requirement that a CTS antenna not exceed a maximum HAAT of 36.6 meters (120 feet) unless the antenna site is located more than 16 kilometers (10 miles) from the Grade B contour of a TV Channel 13 station. For a CTS antenna site located more than 16 kilometers outside the Grade B contour of a TV Channel 13 station, the maximum HAAT will be 152.5 meters (500 feet) as proposed in the *Notice*.[49]

31. As a practical matter, we realize that in certain instances it might be impossible to observe the required HAAT limits and still provide adequate coverage of a given market.[50] Therefore, we will consider waivers of the HAAT limits on a case-by-case basis. An IVDS system operator requesting such a waiver should submit a showing justifying an exception to the HAAT limits accompanied by an adequate technical analysis demonstrating that its proposed CTS signal level would be no greater than the level that would result if the licensee adhered to the general CTS power and HAAT limits.[51] We emphasize that the IVDS licensee will remain totally responsible for resolving complaints of interference to any television receiver caused by any component of its IVDS system.

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[36] KCOP comments at 11.

[37] MSTV comments at 4-5, KCOP comments at 4-7, NAB comments at 7.

[38] KCOP comments at 12.

[39] Thomson Consumer Electronics comments at 13.

[40] *See* 47 CFR Section 73.683, which uses the Grade B contour as the interference contour of a TV signal and notes that under actual conditions the coverage area may vary greatly from the predicted area due to the difference between actual terrain and average terrain.

[41] *See Notice* at para. 14.

[42] For example, *see* 47 CFR Sections 74.705(a) and 80.215(h)(2).

[43] *See Reply of TV Answer*, RM-6196, filed July 13, 1990.

[44] *See Comments of MSTV*, RM-6196 (July 30, 1990) at 2.

[45] *See Comments of MSTV, supra*, at 1.

[46] *See* 47 CFR Section 15.17.

[47] TV Answer comments at 22-23.

[48] MSTV comments at 5.

[49] Subject to the provisions of 47 CFR § 95.51.

[50] For example, acceptable coverage may be difficult to provide in so-called "urban canyons."

[51] We also would consider waivers of the HAAT limits when IVDS stations are co-located with a TV channel 13 transmitting antenna, such as suggested by RTT, or when other measures are taken to avoid interference with TV operations.

32. *Minimum separation distance.* In the *Notice*, we invited comment on our proposal to require a 200 foot separation between an IVDS base station (CTS) and nearby residences in order to minimize potential interference from CTSs to televisions that might be operating in the vicinity.

33. *Comments.* MSTV supports requiring a minimum 200 foot separation distance between a CTS and adjacent residences. Additionally, KCOP suggests that the rules require base station mileage separations of four miles to prevent overlapping IVDS signals from creating a stronger combined interfering signal.[52] TV Answer, however, argues that such a requirement would destroy operational flexibility and is unnecessary to prevent interference due to the proposed power limits and filter requirements.[53]

34. *Decision.* Given the transmission rates and power levels at which the base stations in a system such as TV Answer's would operate, we believe that a minimum separation distance is necessary to protect nearby television receivers in TV Channel 13 service areas. Accordingly, to avoid the potential for interference, we will adopt a minimum CTS-to-nearest residence separation distance of 61 meters (200 feet) as proposed in the *Notice*. We are not persuaded, however, that overlapping IVDS signals would increase the interference potential of an IDVS system. We thus find that KCOP's suggestion that base stations be separated by four miles would serve no technical purpose and could make it impossible for IVDS licensees to provide coverage to their markets.

35. *In-home units.* We proposed in the *Notice* that the in-home unit, or RTU, be limited to a maximum ERP of 20 watts, that it incorporate automatic power control in order to ensure use of the minimum power necessary to communicate with its CTS, and that the RTU antenna be an integral part of the unit itself. These limitations were proposed to decrease the potential for interference from a subscriber's RTU to neighboring TV receivers. In the *Notice* we also noted that the operational characteristics of TV Answer's RTU design were such that transmissions would occur infrequently and be of limited duration.

36. *Comments.* TV Answer contends that requiring a RTU antenna to be an integral part of the unit itself is unnecessary and would restrict severely the usefulness of IVDS. It argues that in a multi-unit residential building, installation of a master rooftop antenna for all RTUs within the building might be necessary.[54] MSTV supports our proposal that RTUs incorporate automatic power control and requests that the rules specify that an IVDS system be designed to control from the CTS RTU power levels and the length of time that any one RTU may transmit per hour. Both MSTV and NAB argue that an RTU's maximum duty cycle should be limited in the rules. For example, MSTV suggests that the rules prohibit the maximum duty cycle from exceeding five seconds per hour.[55] KCOP also suggests that we place a specific limit on the duty cycle of these intermittent transmissions as a method of minimizing interference.[56]

37. *Decision.* Our principal technical concern in this proceeding is that IVDS systems not cause interference to other services. We believe that the power limits and other technical requirements contained in the attached rules adequately address that concern. We will thus adopt a maximum ERP limit of 20 watts for RTUs and our proposal that each RTU incorporate automatic power control to limit the maximum ERP to the minimum necessary for successful communication with its CTS. With regard to RTU antennas, we agree with TV Answer that the proposed integral antenna requirement could in some instances unnecessarily restrict IVDS operations. On the other hand, we remain concerned that the unrestricted ability to readily connect the RTU to an exterior antenna could lead to instances of possible interference. Therefore, we will require that all RTUs marketed to and installed by an individual IVDS subscriber include an integral antenna. RTUs that use exterior antennas will also be permitted, if installed by the IVDS system operator in connection to a master antenna system. However, we will require that the external antenna not exceed 6.1 meters (20 feet) above ground or existing man-made structure (other than an antenna structure).[57]

38. We also concur with NAB, MSTV and KCOP that the maximum duty cycle of the RTU should be specified in the rules. We believe that specifying a maximum duty cycle will provide an additional interference safeguard. We believe, however, that the five seconds per hour duty cycle suggested by MSTV might unnecessarily inhibit some IVDS system designs and operations, particularly those RTUs transmit extremely short bursts of information such as in the proposed TV Answer system. Therefore, we will require that the maximum duty cycle of the RTU not exceed five seconds per hour as suggested by MSTV; or alternatively, that the maximum duty cycle of the RTU not exceed one percent within any 100 millisecond interval.

39. *Emissions.* In the *Notice*, we proposed a pulsed data type of emission (V1D) for IVDS. To minimize interference to both TV Channel 13 and adjacent channel AMTS operations, we proposed limiting IVDS out-of-band emissions and proposed a frequency tolerance of 0.0005 percent. *See* proposed Sections 95.859, 95.861 and 95.863. These proposals were based generally on TV Answer's filings in this proceeding.

40. *Comments.* TV Answer does not oppose our proposed requirements. It does suggest, however, that we permit any emission type that complies with the out-of-band limits specified in proposed Section 95.861.[58] RTT states that type V1D is broad enough to allow a variety of modulation techniques; however, it too suggests that other emission types be permitted.[59]

41. *Decision.* We will not limit emissions to class V1D. Both TV Answer and RTT argue persuasively that such a limitation would be an unnecessary restriction on system design. We believe that interference concerns are sufficiently addressed by our other operational requirements. Therefore, we will allow emission types and frequency tolerances that comply with the out-of-band limits specified in Sections 95.857 and 95.861 of our new rules, see Appendix A.

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52 KCOP comments at 11.
53 TV Answer reply comments at 17.
54 *See* TV Answer comments at 23; and reply comments at 18.
55 NAB comments at 5-6; MSTV reply comments at 6.
56 KCOP comments at 12.
57 *See* 47 CFR § 17.4.
58 TV Answer comments at 24.
59 RTT reply comment technical statement at 8.

42. *Channelization.* In the *Notice* we observed that the TV Answer system divides the allocated spectrum into discrete channels, then uses the channels within the system in a cellular-like manner. We stated that we saw no reason to require IVDS operators to use such channelization. Rather, in order to allow the use of alternative technologies, we proposed that licensees make their own decision with regard to channelization.[60]

43. *Comments.* TV Answer argues that channelization would protect TV Channel 13 operations by forcing systems into a lower power cellular arrangement, would provide universal IVDS coverage, and would promote efficient use of the spectrum.[61] TV Answer also argues that channelization would simplify coordinating competing IVDS systems in the same market. Conversely, RTT contends that requiring channelization would preclude alternate technologies. Further, RTT argues that TV Answer's contention that unless channelization is adopted it will preclude IVDS service over large areas is untrue, although channelization might limit the TV Answer design.[62]

44. *Decision.* We are not persuaded that we should require channelization in IVDS systems. No significant additional protection would be afforded to TV Channel 13 operations through channelization. Our power, HAAT, and out-of-band emission limits should adequately protect TV Channel 13 operations,[63] regardless of the manner in which the system is channelized. In addition, we are not persuaded that requiring channelization would improve the potential coverage of an IVDS system, as TV Answer contends. We believe that satisfactory coverage can best be obtained if IVDS licensees coordinate competing systems in the same market and structure their systems in a manner that provides adequate coverage. We also agree with RTT that a channelization *requirement* might preclude future alternative systems or technologies. Therefore, IVDS licensees are free to choose any channel plan that suits their operations. Licensees with different technologies and channel plans, however, must cooperate to minimize in-band (218-219 MHz) interference.

45. *Interference prevention.* We proposed to require IVDS licensees to inform all television households located within the Grade B TV Channel 13 coverage area of the potential for interference from an IVDS system. In addition, we proposed that licensees of such systems be required to provide and install, free of charge, an interference reduction device to each household within the Grade B contour of a TV Channel 13 station that experiences interference from the IVDS system. We also proposed requiring the IVDS licensee to investigate and eliminate such interference within 30 days of the time it is notified in writing of an interference complaint. If the interference is not eliminated within the 30-day period, operation of the offending transmitters of the IVDS would have to be discontinued. *See* proposed Section 95.855.

46. *Comments.* The NAB requests that we mandate, for all IVDS service, all technical aspects of the TV Answer system that afford increased interference protection to the affected TV Channel 13 station.[64] The NAB states that the ultimate interference potential of large numbers of IVDS transmitters in homes is difficult to predict and justifies implementation of any and all possible technical safeguards to protect existing television channel 13 service.[65] Thomson Consumer Electronics, Inc. requests that we require TV Answer to conduct additional tests to fully determine the extent of possible interference with *all* broadcast and cable channels.[66] MSTV requests that we extend IVDS interference protection obligations to TV translator stations.[67] Fox Television Stations, Inc. would extend this protection to low power TV stations in addition to TV Channel 13 translator stations.[68]

47. KCOP states that our proposal to require IVDS licensees to resolve interference complaints does not impose a time period for when an IVDS licensee must inform TV households about potential IVDS interference. KCOP suggests that we require IVDS licensees to mail notifications to households no more than two weeks before and no more than two weeks after initiation of IVDS service, and that we require licensees to provide similar notification to all households in TV Channel 13 service areas twice per year for the first two years of service and once each year thereafter.[69] EBC also recommends use of this notification schedule, but would require the IVDS licensee to notify all households within the TV station's actual Grade B contour rather than just the IVDS operator's own customers.[70]

48. KCOP also believes the rules should require IVDS licensees to install filters on every television in the households of their *own* subscribers at the time IVDS is installed in a TV Channel 13 viewing area.[71] Fox Television Stations states that a notch filter may not be effective in eliminating all interference.[72] The NAB asserts that retrofitting existing receivers with notch filters is no substitute for proper spectrum management.[73]

49. *Decision.* We continue to believe that the interference elimination plan first offered by TV Answer and then made a proposal in the *Notice* strikes a reasonable balance between our strong desire to protect television reception from potential IVDS interference and our interest in not placing an undue burden on the IVDS licensee. With regard to questions raised by commenters, such as the NAB, concerning the prediction of interference potential of large numbers of IVDS transmitters, or the efficacy of interference reduction devices, we again emphasize that the overall requirement is that IVDS systems not cause harmful interference to television reception. This requirement must be met regardless of the television channel experiencing interference due to IVDS operations. If it is determined that an IVDS system, or parts of that system, are the cause of harmful interference to television reception, the IVDS licensee will be responsible for eliminating

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[60] *See Notice* at para. 17.
[61] TV Answer reply comments at 11.
[62] RTT reply comment technical statement at 3.
[63] AMTS coast and ship station operations in the adjacent bands also will be adequately protected by these limits.
[64] NAB comments at 3.
[65] NAB comments at 6.
[66] Thomson comments at 14.
[67] MSTV comments at 10-11.
[68] Fox comments at 4.
[69] KCOP comments at 13.
[70] EBC comments at 5.
[71] KCOP comments at 13-14.
[72] Fox comments at 5.
[73] NAB comments at 11.

all unwanted interference caused by his system. If that interference cannot be eliminated, as suggested by Fox, through installation of an interference reduction device such as a notch filter, the IVDS system licensee will be required to seek other measures, including cessation of operation of offending transmitters. It should be noted that an IVDS subscriber might experience some interference to its television reception when operating the RTU. Therefore, it might behoove the IVDS licensee to install interference reduction devices on the television receivers of its subscribers. However, we will not make this a requirement separate from our requirement that IVDS systems not cause interference to television reception. It will be at the subscriber's discretion as to whether sporadic interference to his own household television reception that might be caused by RTU operation is unacceptable. If such potential interference occurs, is found to be unacceptable, and cannot be eliminated by the IVDS operator, the subscriber could choose to discontinue IVDS service.

50. With regard to the notification schedule proposed by KCOP, we feel that schedule is overly burdensome. However, we agree that the time period for notifying TV viewing households of the potential for interference from IVDS needs to be stated precisely. KCOP's suggestion that we require IVDS licensees to mail notifications to TV households no more than two weeks before and no more than two weeks after initiation of IVDS service in the area is a reasonable one. Accordingly, we will adopt the general interference potential notification and reduction procedures set forth in the *Notice*, modified by KCOP's initial notification suggestion as stated above. *See* Section 95.861, set out in Appendix A.

51. With regard to TV translators and low-power TV stations, we note that these are secondary services and receive no interference protection from primary stations in the broadcast bands. We will not require IVDS licensees to protect these secondary services.

Regulatory Structure

52. *Scope.* We proposed in the *Notice* to regulate IVDS service as a new private carrier radio service. Further, to provide flexibility and minimize licensing burdens, we proposed to treat IVDS as a personal radio service under Part 95 (47 CFR Part 95). We also proposed to make assignments on an exclusive basis.

53. *Comments.* TV Answer agrees that IVDS should be regulated as a private radio service and that locally defined service areas will result in licensees being more responsive to local needs.[74] Southwestern Bell Telephone Company (SWBT) argues that state or federal regulation over IVDS is unnecessary, and that IVDS is not an essential service.[75] The United States Telephone Association (USTA) argues that with only two licensees per market it is important that an IVDS licensee not have incentives to turn IVDS into a vehicle for securing private monopoly rents by limiting use of its assigned spectrum. USTA contends that IVDS should be made available only on a common carrier basis.[76] Metscan, Inc. and Integrated Communications Systems, Inc. suggest that the scope of IVDS be broadened to include such applications as remote meter reading and advanced energy management by power companies.[77]

54. *Decision.* The purpose of IVDS is to provide information, products, or services to individual subscribers and to accept interactive responses from subscribers. Because we envisioned IVDS services to be of a personal nature and offered on a subscription basis, and because we wanted to provide as much flexibility as possible, we proposed to regulate IVDS as a private carrier under Part 95. The majority of comments supported our proposal. We continue to believe that IVDS licensees should be treated as private carriers rather than common carriers. First, IVDS providers will not hold themselves out to serve the public indiscriminately.[78] Although services will be offered on a subscription basis, the providers will be free to determine to whom, and on what terms, service will be offered. Second, we find no public interest reason to impose a legal requirement that IVDS carriers hold themselves out as providing service to the public indiscriminately given the competitiveness of the market for interactive services.[79] For example, there are two frequency segments available in each service area or market. Consequently, there is the potential for two IVDS providers in each market, making possible direct competition. In addition, licensees providing IVDS service face competition from other technologies such as the public switched telephone network and interactive (two-way) cable television based systems. Finally, IVDS is not an essential service.[80] Therefore, we will regulate IVDS as a private carrier.[81] Because IVDS is consumer oriented and provides a personal service, and to provide flexibility, we will regulate it under Part 95 of our Rules. We will also make frequency assignments in this service on an exclusive basis.[82] The rules proposed in the *Notice*, however, were written in terms of TV Answer's system. Consistent with our efforts herein to provide for alterative technologies and services, we have modified our rules to give licensees additional flexibility to better serve the market.[83]

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[74] TV Answer comments at 10.

[75] Southwestern Bell Telephone reply comments at 2.

[76] United States Telephone Association reply comments at 4.

[77] Metscan, Inc. comments at 5; Integrated Communications Systems, Inc. reply comments at 10.

[78] *See generally National Assn of Regulatory Commissioners v. FCC*, 525 F.2d 630, 641-42 (D.C. Cir. 1976) (Specialized Mobile Radio Systems held to be private carriers), *cert. denied*, 425 U.S. 992 (1976).

[79] *See also In re Norlight, Request for Declaratory Ruling*, 2 FCC Rcd 132 (1987), *aff'd*, 2 FCC Rcd 5167 (1987). In *Norlight* we similarly found no reason to impose a legal compulsion to provide service to the public indiscriminately. Because there was no such legal compulsion, and because there was no "holding out" as providing service indiscriminately to the public, we concluded that the proposed interstate fiber optic system at issue in that case would constitute a private carrier system.

[80] Purchase of IVDS by the consumer is purely discretionary.

[81] We note that Congress has given us exclusive jurisdiction over the regulation of non-common carrier radio services. Accordingly, state and local rate and entry regulation of such services is preempted by the Communications Act. *Compare California v. FCC*, 798 F.2d 1515 (D.C. Cir. 1986).

[82] The term "exclusive" as applied herein to the licensing process means that a licensee is the only party authorized to transmit in the assigned frequency segment in the service area the licensee is authorized to serve.

[83] For example, licensees will be able to provide subscribers access to data bases by using a personal computer for interaction and services rather than requiring the subscriber to be viewing a

55. *System description.* We proposed that an IVDS system consist of a single cell or a number of interconnected cells, each cell having a CTS and multiple RTUs as components of the system. We proposed that the RTU be located in the residence of a subscriber.

56. *Comments.* TV Answer agrees that IVDS should be provided using a cellular-type plan, stating that multiple CTSs will be needed to cover the service area.[84] TREM Industries also envisions a cellular system design.[85]

57. *Decision.* We will adopt the basic two-way CTS-to-RTU communications system description proposed in the *Notice*. To be consistent with our emphasis on flexibility, however, our rules will allow licensees to provide additional services, such as data base access, that require use of a personal computer. We have also provided for RTUs to be located at places other than a subscriber's residence. This change will allow IVDS to be provided, for example, at private offices, educational institutions, government agencies, and public service locations.

58. *Service Area.* We proposed defining the service area (*i.e.*, the area where a system licensee would have exclusive use of the frequency segment) as a 64.4 kilometer (40 mile) radius from a reference set of coordinates (point-radius approach) determined by the license applicant. We requested comment, however, on alternative definitions for the service area. Statistical Areas (MSAs), as we do for cellular operations; on Designated Filing Areas (DFAs), as we do for private land mobile 900 MHz operations; and on a nationwide service area. *See Notice*, paragraphs 21-23.

59. *Comments.* TV Answer opposes our proposal to define service areas using a licensee-defined point-radius approach. TV Answer states that it is unclear how we would determine which applications are mutually exclusive and that the delay and administrative burden inherent in the proposed system would delay service to the public. It proposes instead that we use the 734 MSA and RSA cellular radio telephone service areas as the IVDS service areas. Pre-designated filing areas, according to TV Answer, would eliminate areas unable to be served by any licensee (white areas) because licensees would file applications according to the proposed market to be served; would establish the basis for determining if applications are mutually exclusive; and would establish a boundary for interference protection.[86]

60. Vision Integrated Marketing recommends that service areas be no smaller than major metropolitan areas.[87] MSTV argues that we should license IVDS on a nationwide basis, stating this would result in equipment being standardized, thus providing a more efficient and uniform basis for technical standards and type acceptance procedures.[88] Home Shopping Network, Inc. (HSN) suggests that we should make one segment available on a national basis and agrees that more than one license should be made available per market.[89] HSN also states it opposes any restraint on multiple or cross-ownership other than a prohibition on multiple interests in applications or systems within the same IVDS market.[90] Vision Integrated Marketing, Inc. states that a nationwide licensee would be acceptable as one of the two licensees in a particular service area, provided that the one national licensee was prevented from having an unfair competitive advantage.[91]

61. *Decision.* We have considered suggestions that we grant a nationwide license for one of the IVDS frequency segments and we have decided not to adopt this suggestion. We believe that reserving one of only two frequency segments for a nationwide licensee is antithetical to our goal of fostering a competitive market in IVDS communications and would unnecessarily restrict the flexibility of entities that wish to use IVDS to market their products or services. A marketer of a product that requires regional or nationwide exposure can enter into agreements with the appropriate local market IVDS licensees if it so desires, thereby obtaining coverage of the desired area. It also is possible that a network will connect individual licensees and supply them with material that is distributed to an area greater than that of a local licensee.

62. We are persuaded by the comments, however, to modify our definition of an IVDS local service area. We agree that pre-designated filing areas will reduce the administrative burdens on both the public and the Commission. Further, pre-designated filing areas will eliminate daisy-chains and thus allow the Commission to license IVDS systems much more quickly, especially in the more populated areas of the country. Accordingly, we will define IVDS service areas, the areas where the frequency segment is licensed on an exclusive basis, in terms of the cellular service areas.[92] These cellular service areas are well known to the communication industry and cover the entire country.

63. *Selection of Licensees.* We proposed selecting among mutually exclusive applicants using a lottery process pursuant to Section 1.972 of our Rules. We also proposed that applications be granted on a first-come, first-served basis. We asked for comments, however, on whether we might alternatively use comparative hearings and auctions.

64. *Comments.* The Action Exchange states it strongly favors the lottery method for awarding IVDS licenses.[93] HSN states that selection among competing applicants should be made by lottery without any weighting based on the intended use of the system or based on characteristics of the owners or the applicants.[94] TV Answer states it supports use of lotteries as long as the Commission predesignates service areas and assigns it one of the two licenses in one of the service areas based on a Pioneer's Preference. TV Answer also states it would support the

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television. We decline, however, to allow IVDS spectrum to be used primarily for the purpose of providing communications for remote meter reading and energy management operations. Entities interested in establishing their own communications systems for these types of operations should establish systems pursuant look to Parts 90 and 94 of our rules. If, however, IVDS licensees have sufficient capacity they may provide such service, at the licensee's discretion, on a limited basis.

[84] TV Answer comments at 15, 17 and Engineering Statement, Figure 1.

[85] TREM Industries comments at 1-8.

[86] TV Answer comments at 10-17.

[87] Vision Integrated Marketing comments at 2.

[88] MSTV comments at 9-10.

[89] Home Shopping Network, Inc. comments at 1.

[90] Home Shopping Network, Inc. comments at 2.

[91] Vision Integrated Marketing, Inc. comments at 1.

[92] *See* Public Notice, Report No. 92-40, released January 24, 1992.

[93] The Action Exchange comments at 1.

[94] Home Shopping Network, Inc. at 2.

use of auctions, were there not serious questions as to our authority to conduct a competitive bidding licensing process.[95] Jewell Television Corporation requests that television stations within the proposed IVDS service areas be given a preference in the lottery process.[96] Vision Integrated Marketing states that a first-come first-serve lottery approach is best. Vision suggests, however, that the system be modified to provide a short period to give competing licensees time "to work it out."[97]

65. *Decision.* We have analyzed carefully the comments on this issue. Selecting among mutually exclusive applicants in each service area using a lottery appears to be the best method available at this time to provide for early introduction of IVDS services and to minimize licensing burdens on both the Commission and the public. As we stated in the *Notice*, we believe that selecting IVDS licensees on the basis of comparative hearings would be expensive for the IVDS applicant, administratively complex for both the applicant and the Commission, and would delay introduction of this new service. Therefore, we will select among mutually exclusive IVDS applicants in each service area using the lottery process specified in 47 CFR § 1.972. However, consistent with other private radio services, such as the General Mobile Radio Service (GMRS) which also is regulated under Part 95, we will not award preferences based on the type of service provided by the IVDS licensee or on the characteristics of the IVDS applicant.

66. We will announce by Public Notice the date on which the Commission will accept applications for IVDS licenses and other pertinent information. We will not issue licenses, however, until the first IVDS transmitter has been type accepted for operation in this service. An applicant can either wait until the equipment it plans to use is type-accepted and available or, alternatively, risk losing its license if lack of type-acceptance or lack of equipment availability causes failure to meet the station construction requirements (*See* paragraphs 71-77). We do not intend to relieve any IVDS licensee of the construction requirements on the basis that development or deployment of technology or equipment took longer than anticipated.[98] This policy is consistent with our approach to licensing stations in the 220-222 MHz band under 47 CFR Part 90.

67. *Licensing Procedure.* In view of the potentially large numbers of IVDS transmitters that might be used in a single system, we proposed a blanket licensing scheme in which all CTSs and RTUs in a given area would be licensed under a single system license. We proposed to use FCC Form 574 which would require a $35.00 charge per call sign.

68. *Comments.* Most of the comments did not explicitly address whether the RTUs should be licensed under a system license, but rather appear to assume that IVDS would be provided as an integrated system.[99] TV Answer agrees with our proposal that CTSs and RTUs should be licensed to the system licensee under a blanket license.[100] TREM Industries also envisions a "system" consisting of central control facilities and user interfaces (the RTUs), both controlled by the system provider.[101]

69. *Decision.* We continue to believe the system licensing approach has merit. There are, however, certain cases in which we must review individual station parameters. Therefore, we will blanket license all CTSs that do not require individual review under an IVDS system license. Further, all RTUs associated with these CTSs will be blanket licensed under the same license. By contrast, CTSs that require special administrative review, such as (1) CTSs that are in the vicinity of certain receiving locations,[102] (2) CTSs that may have significant environmental effect,[103] (3) CTSs that require notification to the Federal Aviation Administration,[104] and (4) CTSs with antennas that exceed 6.1 meters (20 feet) above ground or an existing manmade structure other than an antenna tower, will not be blanket licensed, but rather must be individually licensed.[105] Consistent with our approach to regulate IVDS as a personal service under Part 95, we will use FCC Form 574 as the application form.[106]

70. Because of the limited spectrum available in each market (two frequency segments) and the fact that there appears to be a substantial number of entities interested in this service, we anticipate receiving more IVDS applications than we can accommodate, especially in the major markets. In markets where the number of applications exceeds the number of licenses that can be granted, we will rely on a lottery to select among competing applicants (*see* paragraphs 65-66). In the past, applicants have asserted that there is no need to file all the information required on a Form 574 in order to enter a lottery and that doing so substantially delays the licensing process.[107] In this case, we agree. Accordingly, to minimize the filing burden on both the applicant and the Commission, and to provide for early introduction of IVDS to the public, we are adopting an abbreviated filing procedure for the lottery. For each IVDS system, we will require applicants to submit only FCC Form 155, specifying the applicant's name and address, the service area number,[108] and the fee code along with the appropriate filing fee. Only one Form 155 will be required per system, regardless of the number of CTSs the applicant proposes to construct.[109]

71. As noted above, a fee must accompany the Form 155. Because the service is being regulated as a personal service under Part 95 of the rules, similar to GMRS, applicants must pay a fee of $35.00 per call sign (*i.e.*, per CTS).[110] By requiring only a Form 155, however, we will not know the number of CTSs the applicant proposes to construct. This obviously complicates the issue of what fee

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[95] TV Answer comments at 27-28, 34.
[96] Jewell Television Corporation comments at 2.
[97] Vision Integrated Marketing comments at 3.
[98] *See Report and Order*, PR Docket No. 89-552, 6 FCC Rcd 2365, at para. 69.
[99] MSTV comments at 6-7, KCOP reply comments at 6.
[100] TV Answer comments at 27.
[101] TREM Industries comments at 1-8.
[102] *See* new §§ 95.839 and 95.841, *infra* Appendix A.
[103] *See* 47 CFR §§ 1.1307, 1.1308, 1.1311, and 1.1312.
[104] *See* 47 CFR §§ 17.7 through 17.17.
[105] It will be up to the IVDS licensee to determine if a CTS must be individually licensed.
[106] *See* 47 CFR §1.1102(7), as amended, *infra* Appendix A.
[107] *See, e.g.*, TV Answer's Notice of Ex Parte Contact (December 27, 1991).
[108] The service area number must be specified in the box labeled "Call Sign or Other FCC Identifier."
[109] An applicant may not have any interest in another pending application for the same service area.
[110] *See* 47 CFR § 1.1102.

should be submitted with the Form 155. Although, we could require applicants to specify the number of CTSs contemplated, this approach would lead to different filing fees for different markets.[111] Further, there would be nothing to prevent applicants from submitting a low estimate of the number of CTSs required, thereby reducing the cost of obtaining an IVDS system license. We thus believe the better approach is to initially blanket license all applicants for a predetermined number of CTSs. This approach will resolve the fee issue and is consistent with our goals of reducing licensing burdens, increasing flexibility and providing early introduction of IVDS service. In particular, we believe a minimum of 40CTSs per market[112] would provide the flexibility needed for most IVDS systems.[113] Thus, the filing fee that must accompany the FCC Form 155 will be calculated by multiplying $35.00 by 40 CTSs. This results in a filing fee of $1400.00 for an IVDS system license.

72. We stress that selection as the winner of an IVDS service area does not provide authority to begin operation. Entities must still obtain an IVDS system license. Accordingly, once a tentative system licensee has been selected,[114] it will have two business days to file a Form 574 as an amendment to its application for an IVDS system license. If the application is in order, the Commission will grant a system license with a block of 40 call signs (see new Section 95.815, *infra* Appendix A).[115] Licensees will be free to modify this number in the future.[116] CTSs that require individual licensing will not have to be filed within this two-day period; rather, such applications must be submitted to the address set forth in Section 1.1102 of the rules and be accompanied by a fee of $35.00 per CTS.[117] As proposed in the *Notice*, a licensee may have no ownership interest in, financial interest in, or exercise *de facto* control over, both frequency segments in the same service area.

73. *Licensing Criteria.* In order to reduce the filing of speculative applications by entities that have no real intention of implementing such systems and to avoid the potential for warehousing of IVDS spectrum, we proposed certain basic licensing criteria. For example, we proposed requiring each application to include a plan showing that the proposed system would provide service to at least 50 percent of the proposed service area. We also proposed requiring successful applicants to construct at least 10 percent of the proposed local base stations within one year of licensing and at least 60 percent of those stations within five years. Licensees would be required to file a progress report on the status of the system at the conclusion of each benchmark period and licensees would forfeit their license if they did not meet the construction benchmarks. We also asked for comments on other criteria such as demonstrations of financial ability to construct the proposed system. We also proposed a five year license term.

74. *Comments.* TV Answer states that applicants should be required to provide the geographic coordinates of their proposed base stations, demonstrate financial ability to meet the required benchmarks and demonstrate that they intend to construct the proposed system.[118] TV Answer also states that licenses should be transferrable after 10 percent of the population or land area of the license area is served.[119] RTT states that to prevent speculation, applicants for IVDS should be required to prove that they have a viable technology, are capable both technologically and administratively of building and operating a system, and have the necessary capital available.[120] It also states that sales or transfers of control of licenses should be forbidden until after a system is operational and serving customers.[121]

75. The Action Exchange states that a 'public interest' standard should be a licensing criteria so that financial ability to construct does not become the sole basis on which system licenses are awarded.[122] HSN supports the adoption of reasonable criteria to be satisfied by potential applicants, including financial disclosures adequate to demonstrate the capability of an applicant to build the proposed system(s).[123] Vision Integrated Marketing, Inc. suggests that if an applicant has made a significant investment in IVDS technology, that fact should be considered in the granting of licensees.[124]

76. HSN states that our five-year license term proposal is reasonable, but suggests that a ten-year license term might be more appropriate for any frequency block set aside for nationwide licensing.[125] TV Answer states that a

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[111] Non-standard fees lead to confusion on the part of the public and in the Commission's fee collection process.

[112] The number of CTSs needed depends on a number of factors, such as the type of system and the particular service area. Because of the number of TV Channel 13 stations in and around major metropolitan areas and the requirement that IVDS protect TV Channel 13 operations, we believe most IVDS systems will be designed as low power, cellular-type systems such as TV Answer's system. TV Answer states that the "typical service range of a 'base station' will be on the order of 2 miles (3.2 km)." *See* Reply of TV Answer, Inc., Appendix A at 3 (July 13, 1990). If we apply this standard to the New York Service Area, it would take approximately 250 CTSs to cover 100 percent of the market. The rules, however, only require that 50 percent of the land area be covered within five years. Alternatively, the licensee could choose to cover 50 percent of the population rather than land area, thus reducing further the number of CTSs required. In addition, depending upon the location of the TV Channel 13 transmitting antenna in relation to the IVDS service area, the service range of some CTSs could be greater than the range specified above. Consequently, we believe that selecting 40 CTSs for initial application filing purposes is a reasonable compromise. This compromise provides a conservative estimate of IVDS system requirements and results in a simple and efficient application processing procedure for both applicants and the Commission.

[113] These CTSs must meet the 20 feet antenna rule and could be located anywhere within the service area provided their location is otherwise consistent with our rules.

[114] Applicants selected will be announced by Public Notice.

[115] The two-day time period will start the date the Public Notice is released. This two-day time frame in which to file applications will help ensure that applicants are fully prepared to go through with building an IVDS system and is consistent with our goal of minimizing speculative filings.

[116] *See* new § 95.815 (e), *infra* Appendix A.

[117] Entities must obtain an IVDS system license prior to filing for individually licensed CTSs.

[118] TV Answer comments at 29-31.

[119] TV Answer comments at 31.

[120] RTT comments at 8.

[121] RTT comments at 9.

[122] The Action Exchange comments at 1.

[123] Home Shopping Network, Inc. comments at 1.

[124] Vision Integrated Marketing, Inc. comments at 1.

[125] Home Shopping Network, Inc. comments at 2.

five-year license term is insufficient. It proposes a ten-year license term provided that the licensee files yearly progress reports on the system build-out.[126]

77. *Decision*. Based on the comments, we conclude that a major concern of potential users of this service is that an applicant who obtains a license through the lottery process may not actually build the IVDS system. We believe this concern is valid and have modified our proposed construction requirements, as indicated below, to address it. We are also adopting our proposal that applicants submit a proposed system plan for this same reason. We are, however, modifying that proposal. Specifically, we will not adopt the proposed requirement that applicants provide detailed technical data with the plan, such as modulation type, error detecting and correcting codes, and data throughput. Instead, the plan must show how the applicant intends to minimize interference to adjacent channel users (*i.e.*, TV Channel 13 and AMTS operations). Further, it must include a showing that the proposed system will cover at least 50 percent of the population or land area located within the service area.[127] The plan must be submitted when the tentative selectee files the Form 574 required to obtain its IVDS system license (see paragraph 72). We have not adopted a financial showing certification requirement as suggested by several commenters because of our decision not to license IVDS on a nationwide basis. In the past, for private radio services, we have only required financial certification for applicants for nationwide system licenses.[128] Further, we have adopted other criteria, such as construction requirements, that will reduce the number of speculative applications, and allow us to recover licenses quickly from entities unable to construct and operate their IVDS system. We believe these changes will provide greater flexibility to IVDS licensees, and at the same time help to assure that only *bona fide* applicants apply for IVDS licenses.

78. With respect to our construction requirements, we have revised proposed Section 95.831 to require a licensee to build its IVDS system within five years. Further, because we are blanket licensing every IVDS system for 40 CTSs, we have modified how we will track construction. Instead of counting individual CTSs, we will look at population or area covered. Additionally, we are requiring a report three years after licensing to permit timely recovery of a frequency segment if a licensee is not meeting its construction obligations. Licensee must construct a sufficient number of stations in one year to cover 10 percent of the population or land area, in three years to cover 30 percent of the population or land area, and in five years to cover 50 percent of the population or land area. Licensees not meeting these construction benchmarks[129] will automatically lose their IVDS system license and licenses for all CTSs in that particular market.[130] A licensee that loses its authorization due to failure to meet a construction deadline may not reapply for an IVDS system license for three years from the date the Commission takes final action affirming that the IVDS license has been canceled. We believe these criteria will reduce the number of speculative applications filed and will go a long way toward ensuring that potential licensees intend to construct an IVDS system.

79. Additionally, we have revised proposed Section 95.819 to prohibit transfer of an IVDS system license until the system construction benchmark (50 percent coverage) has been met. We are also adopting rules to prohibit partial assignment of any CTS or spectrum in any IVDS system. The right to construct or operate CTSs in an IVDS system can only be transferred or assigned in whole, not in part.[131] Finally, we are adopting a five-year license term, consistent with the license term used in most other private radio services. The five-year license term strikes a reasonable balance between the administrative burden on both the Commission and the applicant, and our desire to track the status of licensed IVDS operations. These rules will help to reduce any potential for trafficking in licenses by persons who have no real interest in constructing IVDS systems.

80. *RF Hazard*. In the *Notice* we invited comment on the subject of potentially excessive exposure to RF energy that might result from locating TV Answer-type RTUs in the home. Several commenters expressed concern that a 20 watt continuous wave transmission might exceed the American National Standards Institute (ANSI) guidelines for human exposure to electromagnetic radiation used by the FCC.[132] We note, however, TV Answer-type IVDS RTU equipment will be operated with pulsed wave transmissions and a relatively low duty cycle. Our calculations show that RF levels created by TV Answer-type IVDS RTU equipment adhering to our technical limits would be below ANSI guidelines in the vicinity of the equipment. RF levels of other possible types of equipment that meet our power and duty cycle limitations should also fall below ANSI guidelines. Since Part 95 services are already categorically excluded from the requirement to routinely evaluate RF radiation, IVDS licensees will also be excluded from that requirement.[133]

FINAL REGULATORY FLEXIBILITY ANALYSIS

81. Pursuant to 5 U.S.C. Section 603, an initial Regulatory Flexibility Analysis was incorporated in the *Notice of Proposed Rule Making* in GEN Docket No. 91-2. Written comments on the proposals in the *Notice*, including the Regulatory Flexibility Analysis, were requested.

82. *Need for and Objective of Rules*. Our objective is to establish a consumer-oriented interactive video and data service. The rules adopted herein will allow flexibility in implementing this new service, while reducing the potential for this service to interfere with existing services in nearby or adjacent bands.

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[126] TV Answer comments at 31.

[127] We have modified the rule to incorporate TV Answer's suggestion that either population or land area be used to determine if the licensee has met the 50 percent coverage requirement.

[128] *See Report and Order*, PR Docket No. 89-552, *supra* note 98 at paras. 46-52.

[129] To meet a construction benchmark, the required number of CTSs must be constructed. To be constructed, the CTS and two associated 2 RTUs must be in operation.

[130] The automatic cancellation of licenses for unbuilt facilities is also done in the private land mobile services. *See* 47 CFR §§ 90.155 and 90.631.

[131] We will only license two entities for each IVDS service area, one for segment A and one for segment B.

[132] *See i.e.* Thomson comments at 12.

[133] *See* 47 CFR § 1.1307 (b), Note 1.

83. *Issues Raised by the Public in Response to the Initial Analysis.* Most commenters supported allocating spectrum for IVDS, although a majority of those suggested modifications to specific proposals set forth in the *Notice*, although not specifically to the initial regulatory flexibility analysis. As a result, we have modified our proposals as appropriate. For example, in the *Notice* we had proposed to define IVDS service areas in terms of a radius from a reference set of coordinates, we now feel that it would ease the burden on both the Commission and IVDS applicants by defining IVDS service areas by MSA/RSAs.

84. *Any Significant Alternative Minimizing Impact on Small Entities and Consistent with Stated Objectives.* We have reduced burdens wherever possible. The regulatory burdens we have retained are necessary in order to ensure that the public receives the benefits of innovative new services in a prompt and efficient manner. We will continue to examine alternatives in the future with the objectives of eliminating unnecessary regulations and minimizing any significant economic impact on small entities. The Secretary shall send a copy of this *Report and Order* to the Chief Counsel for Advocacy of the Small Business Administration.

ORDERING CLAUSES

85. Accordingly, IT IS ORDERED, that Parts 1, 2, and 95 of the Commission's Rules and Regulations ARE AMENDED as specified below, [effective 30 days after publication in the Federal Register]. This action is taken pursuant to Sections 4(i), 7(a), 303(c), (g), and (r), and 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 157(a), 303(c), (g), and (r), and 309(a).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Parts 1, 2 and 95 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

A. Part 1 - PRACTICE and PROCEDURE

1. The authority citation for Part 1 continues to read:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082 as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

2. § 1.926(a)(1) is revised to read as follows:

§ 1.926 Application for renewal of license.

(a) * * *

(1) Renewal of station or system authorizations in the Private Land Mobile Radio Services (Part 90 of this chapter), the General Mobile Radio Service (Part 95, Subpart A of this chapter), and the Interactive Video and Data Service (Part 95, Subpart F of this chapter) shall be submitted on FCC Form 574-R when the licensee has received that Form in the mail from the Commission. If the licensee has not received the Commission-generated Form 574-R within sixty (60) days of expiration, application for renewal of station or system license shall be submitted on FCC Form 405-A.

* * * * *

3. § 1.951 is amended by deleting paragraph (c), redesignating paragraph (d) as paragraph (c), and revising paragraph (a) to read as follows:

§ 1.951 How applications are distributed.

Licensing Division. All applications for radio stations are distributed as follows:

(a) Special Services Branch

(1) All Aviation Radio Services and Maritime Radio Services applications.

(2) Personal Radio Services applications: Amateur, General Mobile, and Interactive Video and Data.

(b) * * *

4. § 1.952(b) is amended by adding a category under the heading Personal Radio Services to read as follows:

§ 1.952 How file numbers are assigned

(a)***

(b)***

Personal Radio Services

ZA-General Mobile Radio Service

ZV-Interactive Video and Data Service

5. § 1.972(a)(1) is amended by adding "Part 95 Subpart F - Personal Radio Services" at the end of the list and amending paragraph (c) to read as follows:

(c) If there are mutually exclusive applications for an initial license for stations subject to Part 80 or Part 87, or if there are more applications for an initial license in Part 90, Part 94 or Part 95-Subpart F, than can be accommodated on available frequencies, the Commission may process the applications pursuant to a system of random selection. Each such random selection shall be conducted pursuant to an order issued by the Private Radio Bureau and under the direction of the Chief of the Bureau.

6. § 1.1102 is amended to read as follows:

§ 1.1102 Schedule of charges for private radio services.

Action	FCC Form	Fee	Fee type	Address
*	*	*	*	*
7. General Mobile Radio Service:				
a. New, Modification and/or Renewal (per call sign).				
(i) General Mobile Radio Service	FCC 574	35	PAL	Federal Communications Commission, General Mobile Radio Service, P.O. Box 358230 Pittsburgh, PA 15251-5230
(ii) Interactive Video and Data Service	FCC 574 FCC 155	35	PAI	Federal Communications Commission, Interactive Video and Data Service, P.O. Box 358365, Pittsburgh, PA 15251-5365
b. Renewal of license (per call sign).				
(i) General Mobile Radio Service	FCC 574R	35	PAL	Federal Communications Commission, 574R Land Mobile Renewal, P.O. Box 358245, Pittsburgh, PA 15251-5245
	FCC 405A, FCC 155	35	PAL	Federal Communications Commission, 405A Station Renewal, P.O. Box 358270, Pittsburgh, PA 15251-5270
(ii) Interactive Video and Data Service	FCC 574R FCC 155	35	PAI	Federal Communications Commission, 574R Land Mobile Renewal, P.O. Box 358245 Pittsburgh, PA 15251-5245
	FCC 405A, FCC 155	35	PAL	Federal Communications Commission, 405A Station Renewal, P.O. Box 358270, Pittsburgh, PA 15251-5270
c. * * *				
*	*	*	*	* * *

B. PART 2 - FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS: GENERAL RULES AND REGULATIONS

1. The authority citation in Part 2 continues to read:

AUTHORITY: Sec. 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. 154, 302, 303, and 307 unless otherwise noted.

2. § 2.106, the Table of Frequency Allocations, is amended by listing footnote US317 in columns 4 and 5 and adding the use designator "Personal Radio Services (95)." in column 6 for the 216.0-220.0 MHz band and adding the text of footnote US317 to the list of footnotes at the end of the table as follows:

§ 2.106 Table of Frequency Allocations

* * * * *

International Table			United States Table		FCC use designators	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	Government Allocation MHz	Non-Government Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
*	*	*	*	*		*
	216-220 FIXED. MARITIME MOBILE. Radiolocation 627 627A		216-220 MARITIME MOBILE Aeronautical-Mobile. Fixed. Land Mobile. Radiolocation 627 US210 US229 US274 US317 G2	216-220 MARITIME MOBILE Aeronautical-Mobile. Fixed. Land Mobile. 627 US210 US229 US274 US317 NG121	MARITIME (80). Private Land Mobile (90). Personal Radio Service (95).	
*	*	*	*	*		*

United States (US) Footnotes

* * * * *

US317 The band 218.0-219.0 MHz is allocated on a primary basis to the Interactive Video and Data operations.

C. PART 95 - PERSONAL RADIO SERVICES

1. The authority citation for Part 95 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303.

2. § 95.1 is revised by adding paragraph (c) to read as follows:

§ 95.1 The General Mobile Radio Service (GMRS).

(a) ***

(b) ***

(c) The Interactive Video and Data Service (IVDS) is a two-way point-to-multipoint radio service intended for system licensees to provide information, products, and services, and to obtain responses from, subscribers in a specific service area. The rules for this service are contained in Subpart F of this Part.

3. Part 95 is amended by adding a Subpart F, and its table of contents, to read as follows:

Subpart F - Interactive Video and Data Service (IVDS)

GENERAL PROVISIONS

Sec.

95.801 Scope.
95.803 IVDS description.
95.805 Permissible Communications.

SYSTEM LICENSE REQUIREMENTS

95.811 License requirements.
95.813 Eligibility.
95.815 License application.
95.817 Application for renewal of license.
95.819 License not transferable.
95.821 Application for transfer of control.

SYSTEM REQUIREMENTS

95.831 Service requirements.
95.833 Construction requirements.
95.835 Station identification.
95.837 Station inspection.
95.839 Operation in the National Radio Quiet Zone.
95.841 Operation near an Commission monitoring facility.

TECHNICAL STANDARDS

95.851 Type Acceptance.
95.853 Frequency segments.
95.855 Transmitter effective radiated power limitation.
95.857 Emission standards.
95.859 Antennas.
95.861 Interference.
95.863 Duty cycle.

Subpart F-Interactive Video and Data Service (IVDS)

GENERAL PROVISIONS

§ 95.801 Scope.

This Subpart sets out the regulations governing the licensing and operation of an Interactive Video and Data Service (IVDS) system. The rules in this Subpart are to be read in conjunction with applicable requirements contained elsewhere in the Commission's Rules.

§ 95.803 IVDS description.

(a) An IVDS system is a point-to-multipoint, multipoint-to-point, short distance communications service for its licensee to provide information, products, or services to, and allow interactive responses from, subscribers located at fixed locations in the service area.

(b) The components of each IVDS system are its associated administrative apparatus, its response transmitter units (RTUs), and one or more cell transmitter stations (CTSs). Each IVDS system is authorized for a specific service area and frequency segment. There can be a maximum of two IVDS systems per service area. There are two frequency segments available for each service area.

(c) Each IVDS system service area is one of the cellular system service areas as defined by the Commission.

§ 95.805 Permissible Communications.

(a) Each IVDS system may conduct CTS-to-RTU and RTU-to-CTS communications between the system licensee and its subscriber's locations.

(b) Ancillary CTS-to-CTS communications within the same IVDS system is permitted on a secondary basis.

(c) Direct RTU-to-RTU communications are prohibited.

(d) The licensee may use the IVDS system to interact with its subscribers concerning products and services offered, polls conducted, educational classes taught, and activities in conjunction with broadcast and cable operations.

(e) An IVDS system may provide service to fixed locations within the service area such as private residences, places of business, educational institutions, and local, state, or federal government agencies.

(f) No IVDS system may render a common carrier service.

LICENSE REQUIREMENTS

§ 95.811 License requirements.

(a) Each IVDS system must be licensed.

(b) Each component CTS where the antenna does not exceed 6.1 meters (m) (20 feet) above ground or an existing man-made structure (other than an antenna structure) are authorized under the IVDS system license. All other component CTSs must be individually licensed to the system licensee.

(c) Each component RTU in an IVDS system is authorized under the IVDS system license or if associated with an individually licensed CTS, under that CTS license.

(d) The term of each IVDS system license and each CTS license is five years.

§ 95.813 Eligibility.

(a) An entity is eligible to hold an IVDS system license and its associated individual CTS licenses if:

(1) The entity is an individual who is not a representative of a foreign government; or

(2) The entity is a partnership and no partner is a representative of a foreign government; or

(3) The entity is a corporation organized under the laws of the United States of America.

(b) No entity is eligible to hold an IVDS system license if:

(1) The entity already holds an IVDS system license or has an interest in an IVDS system license for the same service area.

(2) The entity had an IVDS system license canceled within the past three years for failure to meet the construction requirements specified in § 95.831 of this Part.

(c) Each individually licensed CTS must also be held by the IVDS system license for the service area in which the CTS is located.

§ 95.815 License application.

(a) An application for an IVDS system license may be filed by an eligible applicant for a service area only when there are less than two existing IVDS system licenses.

(b) Each application for an IVDS system license and each application for a CTS license where the CTS antenna exceeds 6.1 m (20 feet) (*See* § 95.811(b)) must be made on a separate FCC Form 574. Each application for an IVDS system license must be submitted to the Federal Communications Commission, Interactive Video and Data Service, P.O. Box 358365, Pittsburgh, PA 15251-5230. Each application for the CTS must be submitted to the address set forth in §1.1102 of the Commission's Rules.

(c) Each application shall be personally signed by the applicant, if the applicant is an individual; by one of the partners, if the applicant is a partnership; or by an officer or duly authorized employee, if the applicant is a corporation.

(d) Each application for an IVDS system license must include the following:

(1) A cover sheet specifying the applicant's name and address and the specific service area number and name as defined in § 95.803 of this Part.

(2) A completed application (FCC Form 574).

(3) A plan showing how the applicant intends to minimize co-channel interference and interference to adjacent channel users and a showing that the proposed system will provide coverage (39 dbu) to at least 50 percent of the population (1990 census) or land area within the service area.

(e) Each IVDS system license is initially licensed for 40CTSs. Licensees wishing to modify this number must submit a cover sheet as outlined in (d)(1) and a Form 574 specifying the new number of CTSs.

(f) Each request by an IVDS system licensee to add, delete, or modify an individually licensed CTS (the CTS antenna exceeds 6.1m (20 feet) (*See* § 95.811(b))) must include the following:

(1) A cover sheet specifying the licensee's name and address and the specific service area number and name where the IVDS system is located.

(2) A description of the system after the proposed addition, deletion, or modification, including the population in the service area, the number of component CTSs, and an explanation of how the system will satisfy the service requirements specified in § 95.831 of this Subpart.

(3) A separate application (FCC Form 574) for each CTS that is being added or modified.

(4) The license for each CTS that is being deleted.

(g) Any application not complying with the Commission's Rules will be dismissed.

(h) Each application will be processed on a first-come-first-served basis.

§ 95.817 Application for renewal of license.

(a) Each application for renewal of an IVDS system license and for renewal of each individually licensed CTS shall be submitted on a Commission-generated FCC Form 574-R when the licensee has received that form in the mail from the Commission. If the licensee has not received the Form 574-R within sixty days of expiration, application for renewal shall be submitted on FCC Form 405-A.

(b) Each application for renewal must be submitted as part of a renewal package to the address set forth in § 1.1102 of the Commission's Rules.

(c) The renewal package must include a cover sheet specifying the licensee's name and address and the service area number and name.

§ 95.819 License not transferable.

(a) The licensee may not transfer, assign, sell, or give the IVDS system license or any component CTS license to any other entity until the five year construction benchmark (50 percent coverage) has been met.

(b) Once the five year construction benchmark has been met, the licensee may transfer, sell, assign, or give the IVDS system license together with all of its component CTS licenses to any other entity only in accordance with the provisions of § 95.821 of this Part. If the licensee sells or gives away the apparatus, the new owner must obtain a new IVDS system license and CTS licenses before placing it in operation.

§ 95.821 Application for transfer of control.

If an IVDS system licensee agrees to a change in control of the station, the holder must request Commission consent for change of control by filing a Form 703. The licensee shall mail the request, together with the filing fee, to the address specified in § 1.1102 of the Commission's Rules. The document granting such consent must be kept as part of the IVDS system authorization.

SYSTEM REQUIREMENTS

§ 95.831 Service requirements.

Each IVDS system licensee must make the service available to at least 50 percent of the population or land area located within the service area.

§ 95.833 Construction requirements.

(a) Each IVDS system licensee must make the service available to at least 10 percent of the population or area within the service area within one year of grant of the IVDS system license, 30 percent of the population or land area within three years of grant of the IVDS system license, and 50 percent of the population or land area within five years of grant of the IVDS system license. Failure to do so will cancel the IVDS system license automatically. For the purposes of this Section, a CTS is not considered as providing service unless that CTS and two associated RTUs are placed in operation.

(b) Each IVDS system licensee must file a progress report at the conclusion of each benchmark period to inform the Commission of the construction status of the system. The report must be addressed to: Federal Communications Commission, Special Services Branch, 1270 Fairview Road, Gettysburg, PA 17325-7245. The report must include:

(1) A showing of how the system meets the benchmark; and

(2) A list, including addresses, of all component CTSs constructed.

§ 95.835 Station identification.

No RTU or CTS is required to transmit a station identification announcement.

§ 95.837 Station inspection.

Upon request by an authorized Commission representative, the IVDS system licensee must make any component CTS available for inspection.

§ 95.839 Operation in the National Radio Quiet Zone

Before constructing a CTS in any area within the National Radio Quiet Zone (see § 95.41 of this Part) or before changing frequency segment, transmitter power, antenna height or directivity, or the coverage area of an existing CTS or RTU located within any area within the National Radio Quiet Zone, the licensee must give written notification thereof to the Interference Office, National Radio Astronomy Observatory, P.O. Box 2, Green Bank, WV 24944.

(1) The notification must include the geographical coordinates of all component CTS antennas, antenna ground elevation above mean sea level, antenna center of radiation above ground level, antenna directivity, proposed frequency, type of emission, and transmitter power.

(2) If an objection to the proposed CTS is received by the Commission from the National Radio Astronomy Observatory at Green Bank, Pocahontas County, WV, for itself or on behalf of the Naval Research Laboratory at Sugar Grove, Pendleton County, WV, within 20 days from the date of notification, the Commission will consider all aspects of the problem and take whatever action is deemed appropriate.

§ 95.841 Operation near a Commission monitoring facility.

Each CTS and each RTU transmitting from a location within 1.6 km (1mile) of a Commission monitoring facility must protect that facility from harmful interference. Failure to do so could result in imposition of restrictions upon the operation of the CTS or RTU by the Engineer-in-Charge of the facility. (Geographical coordinates of the facilities that require protection are listed in § 0.121(c) of the Commission's Rules.)

TECHNICAL STANDARDS

§ 95.851 Type Acceptance

Each CTS and RTU transmitter must be type-accepted for use in the IVDS in accordance with Subpart J of Part 2 of the Commission's Rules.

§ 95.853 Frequency segments.

(a) Frequency segment A is 218.0-218.500 MHz. Frequency segment B is 218.501-219.0 MHz.

(b) Each CTS and each RTU in the same IVDS system shall transmit in the same assigned frequency segment.

§ 95.855 Transmitter effective radiated power limitation.

(a) The effective radiated power of each CTS and RTU shall be limited to the minimum necessary for successful intercommunication. RTUs must incorporate automatic power control to ensure the minimum power is used. No CTS or RTU may transmit with an effective radiated power (ERP) exceeding 20 watts.

(b) For an IVDS system located in a TV Channel 13 station Grade B predicted contour, the maximum ERP shall be limited as follows:

TV Channel 13 Service Area	Maximum CTS ERP
City Grade	20 watts
Grade A	7 watts
Grade B	1 watt
Grade B +2 miles	1 watt
Grade B +3 miles	3 watts
Grade B +4 miles	10 watts
Grade B +5 miles and beyond	20 watts

§ 95.857 Emission standards.

(a) All transmissions by each CTS and by each RTU shall use an emission type that complies with the following standard for unnecessary radiation.

(b) All spurious and out-of-band emissions shall be attenuated:

(1) Zero dB on any frequency within the authorized frequency segment.

(2) At least 28 dB on any frequency removed from the midpoint of the assigned frequency segment by more than 250 kHz up to and including 750 kHz;

(3) At least 35 dB on any frequency removed from the midpoint of the assigned frequency segment by more than 750 kHz up to and including 1250 kHz;

(4) At least 43 plus 10 log (base 10) (mean power in watts) dB on any frequency removed from the midpoint of the assigned frequency segment by more than 1250 kHz.

(c) When testing for type acceptance, all measurements of unnecessary radiation are performed using a carrier frequency as close to the edge of the authorized frequency segment as the transmitter is designed to be capable of operating.

(d) The resolution bandwidth of the instrumentation used to measure the emission power shall be 100 Hz for measuring emissions up to and including 250 kHz from the edge of the authorized frequency segment, and 10 kHz for measuring emissions more than 250 kHz from the edge of the authorized frequency segment. If a video filter is used, its bandwidth shall not be less than the resolution bandwidth. The power level of the highest emission within the frequency segment, to which the attenuation is referenced, shall be remeasured for each change in resolution bandwidth.

§ 95.859 Antennas.

(a) No CTS antenna shall be elevated higher than necessary to assure adequate service. No CTS antenna structure, including the radiating elements, tower, supports and all appurtenances, may exceed a maximum Height Above Average Terrain (HAAT), as defined in § 90.309 of the Commission's Rules, of 36.6m (120 feet) within an area defined by a boundary line 16 km (10 miles) outside of the Grade B contour of a TV Channel 13 station. When an antenna is located beyond 16 kM (10 miles) from a TV Channel 13 Grade B contour, the HAAT shall not exceed 152.5m (500 feet).

(b) No CTS antenna shall be located within 61m (200 feet) of a residential dwelling.

(c) Except as noted in (d), the RTU antenna must be an integral part of the RTU unit.

(d) In buildings with multiple subscribers (10 or more) RTUs can be connected to a master external antenna. The external antenna cannot be more than 6.1m (20 feet) above ground or above an existing man made structure (other than an antenna structure) and is subject to § 95.861.

§ 95.861 Interference

(a) When an IVDS system suffers harmful interference within its service area from or causes harmful interference to another IVDS system, the licensees of both systems must cooperate and resolve the problem by mutually satisfactory arrangements. If the licensees are unable to do so, the Commission may impose restrictions including, but not limited to, specifying the transmitter power, antenna height, or area or hours of operation of the stations concerned.

(b) The use of any frequency segment at a given geographical location may be denied when, in the judgment of the Commission, its use in that location is not in the public interest; the use of a frequency segment specified for the IVDS system may be restricted as to specified geographical areas, maximum power, or other operating conditions.

(c) Each IVDS system licensee must inform all households located both within a TV Channel 13 station Grade B predicted contour and the CTS service area of the potential for interference from an IVDS system. The IVDS system licensee must also inform those potentially affected households that it will eliminate any objectionable interference caused to television reception by its IVDS system. This notification shall be made no more than two weeks before and no more than two weeks after initiation of IVDS service in that area.

(d) Each IVDS system licensee must provide upon request, and install free of charge, an interference reduction device to any household within a TV Channel 13 station Grade B predicted contour that experiences interference due to a component CTS or RTU.

(e) Each IVDS system licensee must investigate and eliminate interference to television broadcasting and reception, from its component CTSs and RTUs, within 30 days of the time it is notified in writing, by either an affected television station, an affected viewer, or the Commission, of an interference complaint. Should the licensee fail to eliminate the interference within the 30 day period, the CTS or RTU causing the interference must discontinue operation.

(f) The boundaries for each IVDS service area, as defined in § 95.803 of this Part, are the limit of interference protection for an IVDS system.

§ 95.863 Duty cycle

(a) The maximum duty cycle of each RTU shall not exceed 5 seconds per hour, or, alternatively, not exceed one percent within any 100 millisecond interval.

APPENDIX B

Parties Filing Comments in Response to GEN Docket No. 91-2:

1. Action Exchange
2. Alter Barge Line, Inc.
3. American Radio Relay League, Inc.
4. American Waterways Operators
5. Aquarium Corporation
6. Association for America's Public Television Stations
7. Association of Maximum Service Television
8. Bunge Corporation
9. California Public Utilities Commission
10. CEO Interactive Network
11. Children's Television Workshop
12. Commonwealth Edison Company
13. Conticarriers and Terminals, Inc.
14. Corporation for Public Broadcasting

15. Dupont
16. Educational Broadcasting Corporation
17. Egle Associates
18. Five M Transportation Corporation
19. Fox Television Stations
20. Goldberg Co., Inc.
21. Home Shopping Network, Inc.
22. Independent Television
23. Interactive Systems, Inc.
24. Jewell Television Corporation
25. KB Media, Inc.
26. KCOP Television, Inc.
27. Kelley Television Company
28. L&L Oil Company, Inc.
29. Lanford Telecasting Company, Inc.
30. M/G Transport Services, Inc., Goltz
31. M/G Transport Services, Inc., Gurley
32. M/G Transport Services, Inc., Hayden
33. M/G Transport Services, Inc., Ludmann
34. M/G Transport Services, Inc., McCafferty
35. M/G Transport Services, Inc., Mills
36. M/G Transport Services, Inc., Olumart
37. M/G Transport Services, Inc., Phelps
38. M/G Transport Services, Inc., Reed
39. M/G Transport Services, Inc., Sane
40. M/G Transport Services, Inc., Self
41. (M/G Transport Services, Inc., Sholor
42. M/G Transport Services, Inc., Talbert
43. M/G Transport Services, Inc., Uhrig
44. M/G Transport Services, Inc., Whitaker
45. M/G Transport Services, Inc., Zurenko
46. Marine Inland Transportation Company
47. Mel Wheeler, Inc.
48. Metriplex, Inc.
49. Metscan, Inc.
50. National Association of Broadcasters
51. National Public Radio
52. NTV Network
53. Portel Network Services, Inc.
54. Radio Technical Commission for Maritime Services
55. Radio Telecom & Technology, Inc.
56. Stolt-Nielsen, Inc.
57. Tenn-Tom Trading Company, Inc.
58. Thomson Consumer Electronics, Inc.
59. Tribune Broadcasting Company
60. TV Answer, Inc.
61. U.S. Coast Guard
62. Valley Line Company
63. Vision Integrated Marketing, Inc.
64. Waterway Communications System, Inc.
65. Wingerter, E. Scottd
66. Wireless Cable Association
67. (38) Numerous single letter comments placed in the binder to this proceeding.

Parties Filing Reply Comments in Response to NPRM.

1. American Petroleum Institute
2. Anchor Media Television, Inc. and WLOS-TV, Inc.
3. Association for Maximum Service Television, Inc.
4. Association of America's Public Television Stations, et al.
5. Children's Television Workshop
6. Consumer Electronics Group-Electronic Industries Association
7. Corporation for Public Broadcasting
8. Gateway Communications, Inc.
9. George Mason University Foundation, Inc.
10. Guy Gannett Publishing Co.
11. Integrated Communications System, Inc.
12. Interactive Systems, Inc.
13. KCOP Television, Inc.
14. Metriplex, Inc.
15. National Association of Broadcasters
16. Northwest Television, Inc.
17. Philips Consumer Electronics Corporation
18. Pikes Peak Broadcasting Company
19. Radio Telecom and Technology, Inc.
20. Southwestern Bell
21. TV Answer, Inc.
22. United States Telephone Association
23. Waterway Communications System
24. WDIO-TV, Inc.
25. WJG Maritel Corporation
26. WVEC Television, Inc.

Concurring Statement of
Commissioner James H. Quello

RE: Interactive Video and Data Services, GEN Docket No. 91-2.

Interactive video and data services have many potential applications serving consumers, and I am particularly interested in its application for educational purposes. Today's action allocates 1 MHz of spectrum to a wireless form of interactive video. The record does not demonstrate that 1 MHz is needed at this time; therefore, I would have preferred allocating 500 kHz until demand for interactive services has been determined. We are approaching this allocation, or more appropriately stated reallocation, with a Field of Dreams concept that if you build it they will come. Spectrum is far too valuable and in demand to reallocate on such a basis.

The other side of the equation in this reallocation Order is the taking away from the maritime services spectrum allocated for communication along America's waterways. I understand that some of this spectrum is essentially unusable by the maritime industry since it is adjacent to television channel 13 and would likely cause interference to broadcast service. Therefore, other non-interfering services, such as interactive video and data services, should have access to this valuable resource. The primary concern for me then is how much spectrum should be reallocated; and 500 kHz according to the proponents of interactive video and data systems seems to be a reasonable starting point. In the event that the demand for these services exceeds a 500 kHz allocation, then consideration of additional spectrum could be made. Alternatively, if the demand for these services fails to materialize, then the Commission will reclaim unused spectrum. With my primary concern being addressed, I concur with this item.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Tariff F.C.C. No. 1 — Transmittal No. 3735

ORDER

Adopted: February 14, 1992; Released: February 14, 1992

By the Chief, Common Carrier Bureau:

1. On December 20, 1991, AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective February 18, 1992 on 60 days' notice. This transmittal was originally scheduled to become effective January 3, 1992, on 14 days' notice pursuant to the Commission's *IXC Order*. [1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing changes the discount levels that will apply to Software Defined Network (SDN) usage after a customer has completed an SDN term plan and is receiving SDN service on a month-to-month basis.

2. NOS Communications, Inc., Telecommunications Marketing Association, and the Interexchange Resellers Association filed petitions to reject or suspend and investigate Transmittal 3735. AT&T has filed a reply to the petitions.

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 3735 and the appropriate pleadings. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petitions do not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petitions to reject or suspend and investigate AT&T Communications Tariff F.C.C. No. 1, Transmittal No. 3735, filed by NOS Communications, Inc., Telecommunications Marketing Association, and the Interexchange Resellers Association ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon. pending*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-119

In re Applications of

BREEZE BROADCASTING COMPANY, LTD.	File No. BPH-840503IC
MARANATHA BROADCASTING COMPANY, INC.	File No. BPH-850712ME
J. MCCARTHY MILLER	File No. BPH-850712NT
GULF BREEZE BROADCASTING CO.	File No. BPH-850712OE

For Construction Permit for a
New FM Station on Channel 237A
in Gulf Breeze, Florida

Appearances

Barry D. Wood on behalf of Breeze Broadcasting Company, Ltd; *Geraldine M. Carr* on behalf of Maranatha Broadcasting Company, Inc.; *Donald J. Evans* on behalf of J. McCarthy and June J. Miller; and *A. Wray Fitch, III* on behalf of Gulf Breeze Broadcasting, Co.

SUPPLEMENTAL INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH P. GONZALEZ

Issued: February 19, 1992; Released: February 26, 1992

1. By *Memorandum Opinion and Order* (FCC 90R-103) of the Review Board released on October 31, 1990, this proceeding was remanded to the undersigned for consideration of an additional issue designated by the Board in the aforementioned order. The issue, as framed by the Board, is as follows:

> To determine whether J. McCarthy Miller was financially qualified at the time he certified to his financial qualifications, has remained financially qualified throughout the pendency of his application, and is currently financially qualified.

In designating the above set forth issue, the Board referred to applicable precedent as requiring that "an applicant must be financially able to construct and operate *all* of its FCC proposals", adding that Mr. Miller's "outstanding applications appear cumulatively to have required funds equal to several times his asserted net worth". The Board noted that many of his applications were for low power television (LPTV) stations or cellular radio systems. In referring specifically to Mr. Miller's cellular radio applications, the Board went on to state that Mr. Miller's "alleged reliance on 'independent bank letters' to finance his cellular applications does not reveal whether his assertedly 'liquidable' assets would have been encumbered by any such bank loans." The Board concluded, after setting forth its review of Commission precedent, "that a broadcast applicant cannot be considered to be financially qualified if it cannot demonstrate its financial qualifications to build contemporaneously the facilities proposed in parallel FCC applications." The Board made no specific reference to Mr. Miller's many multi-channel MDS applications; however, it repeatedly refers, during the course of its remand order, to the fact that Commission precedent requires that Miller's financial posture at the time he certified his financial qualifications be viewed in light of his obligations with respect to all applications pending before this Commission. It must be assumed, therefore, that the Board considers Mr. Miller's obligations, if any, to his many multi-channel MDS applications as also pertinent to this discussion. Accordingly, Mr. Miller's contention that only his proposed FM broadcast facilities are relevant to this inquiry is clearly not in accord with the Review Board's instructions which are controlling here, and no further consideration will be given to Miller's arguments as to what he considers to be the scope of his burden of proof, since to do so would be contrary to the clear instructions of the Board.

2. The Presiding Judge considers it essential to set forth, in detail, the Board's instructions because of the extensive amount of space Mr. Miller devotes, in his Proposed Findings of Fact and Conclusions of Law and in his Reply statement, to his contention that the Review Board has misinterpreted Commission precedent, and that Commission law requires only that he demonstrate an ability to meet the financial obligations associated with his proposed FM broadcast facilities at Gulf Breeze, Florida, at Orange Beach, Florida, and at Biltmore Forest, North Carolina.

FINDINGS OF FACT

3. The record establishes that as of the date of Miller's certification as to his financial qualifications in this proceeding, he had pending 72 LPTV station applications (Miller Remand, Ex. #1, at 1). Included in this number was an application filed in 1980 for a LPTV station in Little Rock, Arkansas, with estimated construction costs of $80,000 for transmission equipment and yearly operating costs of approximately $150,000 (Breeze Remand, Ex. #1, at 4; Tr. 946-949), or three month operating costs of $37,500.00. The later figure, when added to the construction figure of $80,000.00, would result in total costs for this particular LPTV station of $117,500.00, excluding studio equipment and remodeling.

4. In 1984, Mr. Miller and his wife at that time, who is now deceased, entered into an agreement with John Richard Miller (J. R. Miller) and his wife, whereby the latter persons agreed to invest certain specified sums in two companies, M&M Communications, Inc. and Miller Communications, Inc. By the terms of the agreement, J. R. Miller and his wife would receive 49 percent of M&M Communications, Inc., and 50 percent of Miller Communications, Inc. with Mr. Miller and his wife retained 51 percent of the ownership of M&M Communications, Inc.

and 50 percent of Miller Communications, Inc. (Breeze Remand, Ex. #2). Mr. Miller's many LPTV applications were transferred to M&M Communications, along with his multi-channel MDS applications. The agreement further provides that Miller Communications, Inc. will file in the future 90 cellular radio applications, selected low power TV channels, and FM radio channels. Although the agreement does not so state, Mr. Miller contends that the parties also intended, by entering into this agreement, that J. R. Miller and his wife would fund all of the LPTV stations (Tr. 883-84). According to Mr. Miller, the funding provision set forth in a draft agreement between the parties some how got dropped out of the final written agreement (Tr. 885); and that the only reason why he entered into the 1984 agreement with J. R. Miller, and his wife was for J. R. Miller to cover the complete costs of the LPTV stations as well as the multi-channel MDS operations, freeing him of any financial obligations to these projects and thereby permitting him to fund FM broadcast stations on his own (Tr. 907). The 1984 agreement between the Millers, however, notes that M&M Communications, Inc. which includes J. R. Miller and his wife, will also be involved in FM broadcast applications (Tr. 907).

5. Although the agreement referenced above was amended in December 1984, language indicating that J. R. Miller and his wife were assuming responsibility for financing the LPTV and multi-channel MDS projects was not added to the agreement (Breeze Remand, Ex. #3; Tr. 910-911). In addition, Mr. Miller did not notify this Commission of J. R. Miller's ownership interest in M&M Communications, or his alleged assumption of full responsibility for funding the construction and operation of the proposed facilities (Tr. 973-974), or that he, Mr. Miller, was no longer relying on his own personal funds for the construction and operation of the LPTV stations (Tr. 974; Breeze Remand, Ex. #10). In fact, a declaration dated February 1, 1990, executed by Mr. Miller, states that he is responsible for up to 51 percent of the financing for the construction of the Little Rock, Arkansas and Jacksonville, Florida LPTV facilities (Breeze Remand, Ex. #7); and an attachment to that declaration lists Mr. Miller's financial obligations in this regard at $44,880 per station (Breeze Remand, Ex. #8). This statement, which appears to contradict Mr. Miller's contention that J. R. Miller and his wife had assumed full financial responsibility for the LPTV facilities, was characterized by Mr. Miller as incorrect, adding that he simply forgot at the time that J. R. Miller had assumed full financial responsibility for those facilities (Tr. 977).

6. Despite Mr. Miller's contention, there is no evidence that J. R. Miller and his wife, at any time, assumed full responsibility for the financing of all the LPTV stations. J. R. Miller's testimony indicates, simply, that he had agreed to furnish the funds to acquire approximately a half interest in the pending LPTV applications, and to arrange funding for the construction and operation of those LPTV stations which they would decide to build (Joint Stipulation, Ex. #1, at 2); and that he would not have committed any where near the many millions of dollars required to finance all of the applied for LPTV stations (Joint Stipulation, Ex. #1, at 3). The conclusion is inescapable, therefore, that neither Mr. Miller nor J. R. Miller had committed themselves, either individually or collectively, to meet the costs of constructing and operating all of the proposed LPTV stations (Tr. 886-90); that they did not take into consideration the extraordinary financial obligations connected with the sum total of their LPTV applications (Tr. 888-889); and that they had no idea how many of these stations would in the end be built (Tr. 889-890).

7. At the time, Mr. Miller filed his application for the Gulf Breeze, Florida facility, he had approximately 46 multi-channel MDS applications pending before this Commission (Tr. 954; Breeze Remand, Ex. #2; Miller Remand, Ex. #1), all of which were still pending as of August 1987. *See M & M Communications, Inc.* 2 F.C.C. Rcd. 5100 (CCB 1987). Mr. Miller's application for a New Orleans, Louisiana multi-channel MDS station estimated costs at $173,000 for the construction and initial operation of the facility (Breeze Remand, Ex. #6, at 1). Assuming that all 46 multi-channel MDS applications were pending in July 1985, and that each individual facility would have cost the same as the New Orleans system, at least $7,958,000 would have been required to build and operate all of the proposed multi-channel MDS systems.

8. The costs of constructing and operating these multi-channel MDS systems, according to Mr. Miller, was to be covered by J. R. Miller and a lending institution (Tr. 954). Again, the record lacks any evidence indicating that J. R. Miller agreed to meet the costs of all of the applied for multi-channel MDS facilities, either alone or in partnership with a lending institution (Breeze Remand, Ex. #2, at 3; J. R. Miller Stipulation, Ex. #1). Mr. Miller, himself, could not remember whether or not he discussed the possibility of funding all of the 46 multi-channel MDS systems with J. R. Miller (Tr. 954-955), who in turn made it quite clear that he was not prepared to contribute anything in the range of the eight million dollars required to build these systems (J. R. Miller Stipulation, Ex. #1, at 3).

9. As evidence of a banking institution's commitment to the multi-channel MDS projects, Mr. Miller submitted into evidence a letter from the Barnett Bank of Pensacola dated August 2, 1983, signed by F. M. Turner, III, an officer of the bank (Miller Remand, Ex. #1, Attachment B). The letter in question refers simply to the proposed New Orleans, Louisiana multi-channel MDS system. Although Mr. Miller claims that bank financing letters exist for the other systems (Tr. 965-966), these letters were not produced.

10. The letter from the Barnett Bank, referenced above, states that it will consider making funds available for the New Orleans, Louisiana multi-channel MDS facility, adding that it will require the pledge of acceptable assets to secure the loan. The bank does not specifically renounce any intention to call on Mr. Miller's personal assets in order to secure the loan. These, presumably, would be the very same assets upon which Mr. Miller relies to finance the Gulf Breeze, Florida FM station. Although Mr. Miller insists that his personal guarantee was not required in connection with the proposed funding by the Barnett Bank (Tr. 956), he appeared to qualify his response by adding that the Barnett Bank might very well have asked for his personal guarantee and he might have given it (Tr. 958-959).

11. By July 1985, Mr. Miller had submitted approximately 30 applications for cellular radio systems in the markets ranked from 91 to 120 (Tr. 914, 917). Mr. Miller originally estimated the costs of each individual system at between 1 million and 4 million per market (Tr. 917) with the actual cost of building each system at approxi-

mately $2.3 million dollars (Tr. 917). Approximately 60 million dollars would, therefore, have been required to meet the costs of all of the cellular proposals submitted to the Commission prior to July, 1985. There is no evidence of record that Mr. Miller, himself, in July 1985 was willing or able to meet even half of such an enormous financial burden (Miller Remand, Ex. #1, Attachment O), or that J. R. Miller had assumed the responsibility for or was able to fund even part of the total cost of building these systems.

12. Several bank letters were received into evidence in support of Miller's contention that sufficient funds were available to meet the costs of these cellular radio systems (Miller Remand, Ex. #1, Attachment C). Only one of these letters pre-dates July 1985, and that is the July 12, 1984 letter from First American Bank of Pensacola referred to above. The bank indicates in its letter that it does not anticipate any difficulty in arranging the financing for building the applied for cellular radio system. However, the Bank does not commit itself to funding all of the cellular projects on its own, and it acknowledges in its letter with respect to the Pensacola, Florida facility that it may be necessary to seek the participation of other banks. There is no indication in the record that a reasonable assurance of such participation from any another financial institution was in fact secured, or that the First Bank of Pensacola will not require the personal guarantee of Mr. Miller or a pledge of some or all of the assets on which Mr. Miller is relying for the construction of the Gulf Breeze FM station at issue here.

13. Mr. Miller denied that he was personally required to guarantee any bank loans for the cellular systems (Tr. 917-919) and he denied that he ever agreed to do so (Tr. 923). However, in a letter dated June 27, 1986, Mr. Miller confirms his willingness to provide a personal guarantee for a loan from the Bank of Mobile to fund his Binghamton, New York cellular operation (Breeze Remand, Ex. #4; Tr. 923-924), and to provide his personal guarantee when the loan commitment is drawn down.

14. Mr. Miller testified that he is relying on his own liquid assets to finance the construction of his Gulf Breeze, Florida FM station as well as operating costs for three months (Tr. 857). Those assets consisted of coins, cash in the bank, and funds through Inch Investments, Ltd. (Tr. 872). Mr. Miller estimates the value of his coins at the time of the filing of his application at $196,000 (Miller Remand, Ex. #1, at 8). However, no independent appraisal of these coins was made at that time (Tr. 877). Although Michael Ray Flujenz, a coin appraiser, testified during the course of the hearing that the present estimated value of Mr. Miller's coins was $182,000, he did not know the extent or value of coins in July 1985, 1986 or 1987 (Tr. 1169).

15. Mr. Miller, in certifying as to his financial qualifications to be a Commission licensee, also relied on certain oil leases which he valued at $196,000 (Miller Remand, Ex. #1, at 8-9). He indicated that only 85 percent of the actual value of these oil leases was considered as a liquid asset, based on a representation by the Trustee of Inch Investments, Ltd. (Inch) that the trust would be willing to purchase these oil leases at any time subject to a discount of 15 percent from their retail value. Although Mr. Miller testified that Inch had the necessary funds at the time to buy the leases, there is no independent evidence of record to support this claim.

16. Mr. Miller claims that his personal funds were never committed to any other F.C.C. application other than the FM broadcast applications referenced above. His original estimate of the total cost of constructing the Gulf Breeze, Florida station was $88,000 with operating costs for three months of approximately $38,000. This figure was subsequently increased by Mr. Miller in 1988 to $126,000 in construction costs and $50,000 in operating costs (Miller Remand, Ex. #1, at 7). As of June 1985, Mr. Miller states that he had net liquid assets of $576,000 (Miller Remand, Ex. #1, at 7-8 and Attachments N, O), more than enough, he contends, to cover the 1985 construction and operating cost estimates of $176,000. Costs for the Gulf Breeze station are now estimated at $230,000 (Miller Remand, Ex. #1, at 4).

17. From August 1987 to December 1987, Mr. Miller contends that he was obligated to fund only the Gulf Breeze, Florida station and another FM broadcast facility at Biltmore Forest, North Carolina. Estimated costs for the Biltmore Forest, North Carolina FM station were $224,000 (Miller Remand, Ex. #1, at 4), which, when considered along with the costs of the Gulf Breeze, Florida facility, amounted to a total financial obligation during this period of $400,000. He submits that this total obligation was properly covered by his assets during that time which included $500,000 in cash received by Miller Communications in April 1987 as payment for an option to purchase an interest in a Binghampton, New York cellular facility. Mr. Miller testified that he had immediate access to one half of this amount, or $250,000, to cover the costs of the Biltmore Forest, North Carolina station, in addition to his other funds which remained available to cover the costs of the Gulf Breeze, Florida facility.

18. Between December 1987 and February 1990, Mr. Miller was also obligated to construct and operate for three months without revenues an Orange Beach, Florida FM station in addition to the two FM broadcast facilities noted above (Miller Remand, Ex. #1, at 5). The costs of building and operating the Orange Beach, Florida facility was estimated at $222,500 (Miller Remand, Ex. #1, at 5). However, Mr. Miller is pledged to divest himself of the Orange Beach, Florida station in the event that the Gulf Breeze or Biltmore Forest, North Carolina FM facilities are awarded to him or his company (Miller Remand, Ex. #1, at 5). Therefore, in the event that all three FM applications are granted, Mr. Miller would, pursuant to this divestiture commitment, have available for the Gulf Breeze, Florida facility the equipment specified for Orange Beach, Florida station. His total obligations, therefore, would consist of having to fund the construction and operation of the Biltmore Forest, North Carolina and Orange Beach, Florida FM facilities, but only the operating costs for the Gulf Breeze, Florida station, since the Orange Beach, Florida equipment would be available for use at Gulf Breeze, and the only additional expense would be the cost of installing the equipment. Mr. Miller estimates his total financial obligations from December 1987 to February 1990 as totalling $558,500; a figure which includes the $222,500 for the construction and operation of the Orange Beach, Florida, station, the $224,000 required for the construction and operation of Biltmore Forest, North Carolina station, and approximately $100,000 for the initial operations of Gulf Breeze with an additional $12,000 needed to cover the costs of installing the Orange Beach, Florida equipment at Gulf Breeze

(Miller Remand, Ex. #1, at 5 & 6). According to Mr. Miller, Miller Communications, Inc., which filed the cellular applications, had available in December 1987, $496,702 in cash from the Binghampton, New York cellular option, with Miller Communications, Inc. ultimately receiving from this sale a total of $2,755,958. By December 1987, fifty percent of this amount was immediately available to Mr. Miller for his personal use (Miller Remand, Ex. #1, at 6) and on May 17, 1988, $1,563,846 was transferred from Miller Communications to Mr. Miller (Miller Remand, Ex. #1, at 6), an amount, he posits, more than sufficient to meet the financial requirements of all three FM broadcast projects (Miller Remand, Ex. #1, at 6). He notes, however, that since February 1990, he has been obligated to fund only the construction and operating expenses for the FM station at Gulf Breeze, Florida and the station at Biltmore Forest, North Carolina (Miller Remand, Ex. #1, at 4); and that the total costs of building the Gulf Breeze station, if all new equipment is used, is $230,000 (Miller Remand, Ex. #1, at 4), and the Biltmore Forest, North Carolina facility is $224,000 (Miller Remand, Ex. #1, at 4). Mr. Miller submits that his current financial statement which shows net liquid assets of $2,685,987, since the later part of 1989, (Miller Remand, Ex. #1, at 4) with over $1,575,000 in highly liquid money market accounts (Miller Remand, Ex. #1, at 5), is more than sufficient to meet his obligations.

CONCLUSIONS OF LAW

19. As noted above, it is Mr. Miller's contention that he must only demonstrate the financial wherewithal to build the proposed FM broadcast stations; and that the other applications filed with this Commission, in which he has or had an interest, have already met the appropriate financial standards for those applications. He argues specifically that the Commission has expressly eliminated all financial qualifications requirements for applicants for LPTV authorizations, a decision which was applied retroactively as well as prospectively. However, in any case, he submits that the record shows that J. R. Miller has orally agreed to fund or arrange for the funding of all of the successful LPTV license grants. In addition, it is his contention that the Commission in its *Fourth Report and Order*, 4 F.C.C. Rcd. 2542, 2546 (1988) and *Fourth Order on Reconsideration*, 4 F.C.C. Rcd. 4464, 4465 (1989) had indicated that applicants for cellular radio permits for multiple markets need only demonstrate their ability to construct one cellular system, and that he has done so. As for the multi-channel MDS applications, Mr. Miller states that he has shown that he relied on a recognized lender and his 49% partner in M&M Communications, J. R. Miller, to finance any successful applications.

20. Although Mr. Miller insists that J. R. Miller agreed to assume full responsibility for the LPTV applications, the written agreement entered into between J. R. Miller and his wife and Mr. Miller and his wife, does not impose on either J. R. Miller or his wife, the obligation to construct and operate any and all LPTV stations granted by the Commission (see Breeze Remand, Ex. #2). His statement that the agreement with J. R. Miller freed him to finance, on his own, any subsequently applied for FM broadcast stations with his own funds (Tr. 907) is also at variance with the face of the document which talks about Miller Communications, half owned by J. R. Miller and his wife, as possibly being involved in the future in FM broadcast applications (Breeze Remand, Ex. #2, at 4; Tr. 907). In addition, in a declaration dated February 1, 1991, Mr. Miller averred under penalty of perjury, that he was obligated to provide up to 51% of the financing to construct and operate the LPTV stations in Little Rock, Arkansas and Jacksonville, Florida (Breeze Remand, Ex. #7). An attachment to the declaration listed Mr. Miller's obligations in this regard as amounting to $44,880 per station (Breeze Remand, Ex. #8).

21. As noted above, Mr. Miller explained these apparent inconsistencies by calling them mistakes, stating that he simply forgot. Conspicuously absent, however, from J. R. Miller's testimony is any indication that he ever intended to fund or arrange for the funding of all of the LPTV ventures. The record demonstrates, simply, a commitment on J. R. Miller's part, to acquire approximately a half interest in the pending LPTV applications, and to arrange funding for the construction and operation of the stations, if M&M Communications chooses to build them. It is abundantly clear, therefore, that neither Mr. Miller nor J. R. Miller were ever seriously committed to covering the costs of constructing and operating all of the proposed LPTV stations. Similarly, there is nothing, in the 1984 agreement between the Millers which obligates J. R. Miller to finance or arrange for the financing of all of the construction and operating costs of the multi-channel MDS systems, and there is no evidence of record which demonstrates an ability or willingness on J. R. Miller's part to meet the financial demands of all or a part of the multi-channel MDS projects. Nor is there any evidence of record that the Barnett Bank was willing to fund the costs of all of these multi-channel MDS facilities. The record is also devoid of any evidence that Mr. Miller had a reasonable assurance of sufficient funds to meet costs totalling 60 million dollars for all of his 30 cellular proposals submitted on or before July 1985. As of that date, Mr. Miller was clearly not in a position to fund these projects, and he has not shown that his partner, J. R. Miller, was either willing or able to fund or acquire funding for all or even a substantial part of the total requirement of $60,000,000 for the cellular proposals submitted prior to July 1985. The First American Bank of Pensacola, in the only letter of record which predates Mr. Miller's financial certification notes that its funding commitment for the Pensacola, Florida cellular system is conditioned on no material change in "your financial position", adding that the "participation by other banks may be necessary"; and that "the loans will be secured by security arrangements customary for loans of this size, including a security interest in the systems' assets". There is no indication in the record that a reasonable assurance of the participation of other banks was secured, or that Mr. Miller was not required to personally guarantee any loans, despite his disclaimer of such an obligation. As noted above, the letter, itself, does not rule out obtaining a personal guarantee from Mr. Miller, or a pledge of some or all of those assets upon which he relied and relies for construction of the Gulf Breeze FM station. In fact a letter dated June 27, 1986, from Mr. Miller confirms his willingness to provide a personal guarantee for a loan from the Bank of Mobile to fund his Binghampton, New York cellular operation (Breeze Remand, Ex. #4; Tr. 923-24). As noted above, the remaining bank letters post-date the date of certification in this proceeding (see Miller Remand, Ex. #1, Attachment C, at 2-8), and there is no indication in the

record that the financial arrangements described in these post-certifications letters were agreed upon by the end of the year of 1985.

22. The conclusion is inescapable, therefore, that, as of the date of certification of his financial qualifications in this proceeding, Mr. Miller lacked the financial wherewithal to meet all of his obligations to the many FCC applications pending at that time. He has failed, therefore, to show that he was financially qualified as of the date of the filing of his application in this proceeding, and he has not sought at any time to amend his application to show that he was financially qualified. The fact that he may or may not be financially qualified at this time to meet the costs of those projects currently pending before this Commission is not relevant, since he was clearly unqualified, from a financial point of view, for a significant period of time from the date he filed his application for the Gulf Breeze, Florida facility.

Accordingly, the Presiding Judge finds that Mr. Miller was not and is not financially qualified to be a Commission licensee for the Gulf Breeze, Florida FM broadcast facility and his application will be denied.

RULINGS

IT IS ORDERED that in light of the action taken below, the Motion to Enlarge Issues filed by Breeze Broadcasting Company on May 3, 1991 IS DISMISSED as moot.

IT IS FURTHER ORDERED that the application of J. McCarthy Miller for a construction permit for a new FM station in Gulf Breeze, Florida (File No. BPH-850712NT) IS DENIED for failure to show that he is financially qualified.[1]

And IT IS FURTHER ORDERED that the Supplemental Initial Decision is referred to the Review Board for further consideration along with the Initial Decision released in this proceeding on January 3, 1990 (FCC 89D-57) which is currently on appeal before the Review Board.

FEDERAL COMMUNICATIONS COMMISSION

Joseph P. Gonzalez
Administrative Law Judge

FOOTNOTE

[1] In the event exceptions are not filed within thirty (30) days after the release of this Supplemental Initial Decision, and the Commission does not review the case on its own motion, this Supplemental Initial Decision shall become effective fifty (50) days after its public release pursuant to Section 1.276(d) of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 14, 1992

BROADCAST STATION TIME BROKERAGE SURVEY COMPLETED

The Commission's staff has completed a survey of the time brokerage practices of a randomly-selected cross section of radio and television stations.[1] This survey was undertaken in conjunction with an ongoing review of the Commission's radio rules in Docket 91-140 and for general informational purposes.

Background

The Commission has defined "time brokerage" as the sale of discrete blocks of air time by a broadcast station to a broker, who then supplies the programming to fill that time and sells the commercial spot announcements within the programming. Some of these arrangements are known in the industry as local marketing agreements or LMAs. Time brokerage has been a method of selling programming time within the broadcasting industry for many years and has been recognized, particularly with respect to the distribution of non-English language programming, as a means of increasing the diversity of programming available to the public. Recently, however, the use of time brokerage or LMA arrangements appears often to be associated with efforts to sustain the operations of stations facing economic difficulties. The Commission has under consideration in Docket 91-140 a number of issues pertaining to the status and regulation of such agreements under the Commission's rules.

Field Operations Bureau Survey

In December 1991, the Commission's Field Operations Bureau conducted a telephone survey of 284 stations in various-sized markets across the country to obtain information on the prevalence and functioning of time brokerage arrangements. In addition, the Bureau inquired as to compliance with various other Commission rules, such as main studio and public inspection file requirements. Commission staff visited the facilities of those stations indicating that they engaged in time brokerage and requested copies of the agreements involved.

Number of stations and amount of time brokerage involved

The survey identified 17 stations (6% of the total) that engaged in time brokerage. Six of these brokered stations acquired at least 98% of their programming from a broker; one acquired 92% of its programming from a broker; one brokering station provided 100% of its programming to another station through such an arrangement.

Ten of the 17 stations engaging in time brokerage provided the Commission with a written brokerage agreement. The other seven stations submitted documents or contracts suggestive of time brokerage, and further Commission inquiry confirmed that these stations were engaged in such arrangements. Two other stations (both FM) submitted agreements for the sale of advertising time by other stations in the same area without the provision of programming.

Nature of stations and brokerage involved

Of the 17 stations engaged in time brokerage, 16 were radio stations and one was a television station. Of the 16 radio stations, nine were AM and seven were FM. Two of the 16 were an AM/FM combination. One of the radio stations was the brokering station; the other 15 were receiving programming from a broker. The television station was brokered.

Of the 17 stations, three (two FM's and one television station) were in the same service as the brokering station, served substantial areas in common with the brokering station, and simulcasted the programming of the brokering station. Two of the FM stations simulcasted the programming of FM stations located outside of their service areas. (One of these audited stations was the brokering station.)

Of the 17 stations, at least 12 were airing programming provided by a broker not associated with any station licensee. Of those 12, three aired at least 154 hours of the non-licensee's programming per week.

Duration of agreements

The time brokerage agreements reviewed ranged in duration from six months to seven years.

For further information, contact Amy Zoslov, Mass Media Bureau, at (202) 632-3922, or James Davis, Field Operations Bureau, at (202) 632-7270.

FEDERAL COMMUNICATIONS COMMISSION

[1] The stations included in this survey were selected on a random basis. The sample size represents 2.4% of the total (commercial) radio and television population. The difference between the sample mean and the population mean is less than 1% and thus represents a sampling error of less than 1%.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition for Reconsideration of
Notice of Apparent Liability of
MEG Associates,
Limited, Files Nos.:
Former Licensee of BR-880801UY
Stations BRH-880801YU
WDAR/WDAR-FM,[1]
Darlington, S.C.

MEMORANDUM OPINION AND ORDER

Adopted: February 13, 1992; Released: February 26, 1992

By the Commission:

I. INTRODUCTION

1. The Commission has before it a "Response to the Notice of Apparent Liability" filed on August 28, 1989, by MEG Associates, Ltd. former licensee of WDAR/WDAR-FM; and a Petition for Reconsideration filed on August 28, 1989, by Radio Carolina Limited Partnership, the present licensee of the stations.[2] The former licensee and the current licensee request that the Commission reconsider its decision contained in a By-Direction Letter and a Notice of Apparent Liability for Forfeiture (*Letter)* released July 27, 1989, *Stations WDAR and WMWG (FM) Darlington, S.C.*, 4 FCC Rcd 6163 (1989), in which we concluded that the former licensee's failure to comply with the Commission's affirmative action rules warranted reporting conditions, a forfeiture of $12,000 and a short-term renewal of license. *See* 47 C.F.R. Section 73.2080 (b)(3), (b)(5), (c)(3) and (c)(5). In its response, the former licensee requests that the Commission eliminate the forfeiture. In its petition, the current licensee requests that the Commission eliminate the reporting conditions and grant renewal of the licenses for a full term. [3]

II. BACKGROUND

2. The *Letter* sets out the stations' record of inadequate EEO efforts. Review of the former licensee's renewal applications and response to our inquiries revealed inadequate efforts to recruit, hire and promote minorities. Specifically, we found that although the licensee listed three sources deemed appropriate for female and minority recruitment, it failed to contact these sources for minority referrals during the renewal period. In addition, we found that the licensee was unable to produce any records of its EEO efforts from 1984 to 1987. Further, we noted that the stations' 1987 and 1988 Annual Employment Reports revealed only one minority (6.7%) on a full-time staff of 15 employees in a market with a 35.2% available minority labor force. The reports for 1984-1986 reflected no minority full-time employees. Finally, we found that the licensee failed to hire a full-time minority employee in ten hiring opportunities during the last 12 months of the license term under review.

3. The former licensee puts forth three arguments in support of its request that the Commission eliminate the forfeiture. First, it argues that no discrimination took place.[4] The licensee states that it has always been its policy to afford equal employment opportunity. It also states that, "[a]ll managers were aware of this policy and, we believe, endeavored to uphold that policy." Second, the former licensee argues that the forfeiture should be eliminated because "[d]etailed records of EEO compliance to the letter of the rules may exist." It explains that its general manager who was responsible for implementation of the EEO program during the period prior to the renewal year suffered an emotional breakdown. Thus, the former licensee states that it has been unable to obtain any records describing the stations' EEO efforts. It asserts that the general manager's wife "believe[s] that [the general manager] compl[ied] with all EEO requirements and did keep records." The former licensee states that it is making every effort to obtain this information. Third, it asserts that excessive losses in debt-service and expenditures incurred while waiting for its assignment and renewal applications to be approved represent financial penalties that are already excessive and, therefore, that additional sanctions would be unwarranted.

4. The current licensee also makes three arguments in support of its request for reconsideration. First, it argues that the Commission's policy concerning short-term renewals and reporting conditions as articulated in *Woolfson Broadcasting Corp.*, 4 FCC Rcd 6160 (1989) *(Woolfson)*, is inapplicable in this case. It argues that, unlike the station in *Woolfson*, it became the licensee of WDAR/WDAR-FM five months prior to the Commission's disposition of MEG's renewal applications and, as such, it had implemented a comprehensive affirmative action plan when the Commission's decision was released. The current licensee argues that, unlike the assignee in *Woolfson*, it took control of the stations before receiving notice of what action the Commission would take and so it did not knowingly purchase stations with an inadequate EEO program.

5. Second, the current licensee argues that the policy announced in *Woolfson* is out of step with Commission precedent to the extent that the policy seeks to punish the station (as opposed to the licensee) and disregards the lack of culpability of the new licensee. In support, it cites *Rust Communications Group, Inc.*, 61 FCC 2d 548 (1976), *aff'd on recon.*, 64 FCC 2d 632 (1977), in which the Commission refused to impose a short-term renewal and reporting conditions on an assignee on the grounds that "the new licensee would bear the burden. . ." The current licensee also indicates that the Commission stated that there was no indication that the assignee would fail to conform to its EEO Rule. *Rust*, 61 FCC 2d 548, 553. It argues that this rationale should apply here because it is not the licensee adjudicated as having an inadequate affirmative action program, nor is there any evidence that it would not comply with the Commission's EEO Rule. Third, the current licensee argues that the Commission should renounce the policy articulated in *Woolfson* because the public interest is not served by a policy of "punishing the innocent new owner of a radio station for the transgressions of the former licensee."[5]

III. DISCUSSION

6. Reconsideration is appropriate where the petitioner shows either a material error or omission or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters. *See WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom., Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). 47 C.F.R. Section 1.106 (c). Applying this standard, reconsideration of the *Letter* is not appropriate as discussed below.

7. The former licensee's response to the *Letter* does not provide a basis for reducing or eliminating the forfeiture. As our *Letter* indicates, there was no evidence of discrimination. 4 FCC Rcd at 6163. However, avoiding discriminatory employment practices is not the only requirement under our EEO Rule. A licensee also is expected to establish and maintain an EEO program reflecting positive and continuing efforts to recruit, hire and promote qualified minorities and women when job vacancies occur. In addition, a licensee is expected to document and continuously self-assess its program in order to ensure that it is attracting a diverse group of applicants. It is in these latter areas that the former licensee failed to comply. The former licensee's assertions that documentation of its EEO efforts may exist are insufficient to support elimination of the forfeiture. The former licensee states that its general manager was "a meticulous record keeper." It also states that during a conversation between its president and the former general manager's wife, she expressed a belief that the general manager complied with all EEO regulations and kept complete records. The former licensee, however, provides no specific evidence which would constitute a material error or omission in our original *Letter*, nor does it provide specific additional facts which were unknown or did not exist prior to our original decision. In fact, no additional facts whatsoever are presented. The unsupported opinions of the president and the manager's wife concerning the former licensee's EEO efforts are insufficient to warrant elimination of the forfeiture.

8. Lastly, the former licensee argues that it has been punished already in excess of a $12,000 forfeiture in the way of substantial losses and expenditures due to the delay in processing the renewal and assignment applications. Without a further showing of financial hardship, such a factor is not a basis for reducing a forfeiture. Accordingly, this argument is rejected.

9. The current licensee argues that our policy as discussed in *Woolfson* is punitive, fails to serve the public interest and is out of step with our precedent. We disagree. Previously, we have discussed in great detail why we view the imposition of reporting conditions and short term renewals as necessary remedial tools, not punishments. We also have discussed at length why such remedial tools should be used, even when a station under review is being sold. In concluding that these actions were in the public interest we stated:

> Once we have determined that only short-term renewal with conditions is appropriate, the remaining issue is whether we should refrain from imposing these prospective remedies when, as in this case, an assignment application is pending . . . Because the short-term and reporting conditions serve a largely remedial function -- ensuring that the facility is operated in compliance with our EEO rules -- we see no public interest reason not to impose those measures in a case where they are otherwise appropriate, simply because the license is being assigned. Such an approach would permit a station with defective EEO performance to be passed to different owners over a period of time without having to comply with our EEO rules. That approach would not serve the public interest.
>
> Similarly, it would not be appropriate to refrain from imposing prospective remedies merely because there is no evidence that the assignee will not comply with our EEO rules. If it chose to focus on the proposed buyer, the Commission would need to enter the morass of having to examine each buyer's worthiness for arguably different treatment. Such an exercise would be difficult and time-consuming and, above all, would not be an effective means of ensuring future EEO compliance at stations where the assignor did not maintain an adequate EEO program. We do not believe that any unfair burdens are imposed on entities that knowingly purchase such stations by requiring them to be subject to the same limitations and conditions as the existing licensee would be if it chose to keep its station . . . Therefore, once we have determined that particular EEO remedies are appropriate, they are to be implemented by whomever is operating the station, whether that licensee was the one responsible for the violations or is simply the successor-in-interest to the former licensee."

See Woolfson, at 6160-6161. The clear and exhaustive discussion in *Woolfson* expresses our rationale for permitting remedial sanctions to pass with the license to the buyer. To the extent that *Rust* is inconsistent with *Woolfson*, we note that *Woolfson* has clearly articulated our policy on this issue for a number of years and is controlling.[6]

10. Next, the current licensee argues that it did not knowingly purchase a station with an ineffective EEO program as was the case in the *Woolfson* decision. The assignee argues that it took control of the stations before receiving notice of the action the Commission would take on the renewal applications. This argument is without merit. The current licensee unquestionably knew that it was taking a license that was awaiting Commission renewal action. We note that it signed an amendment to the assignment applications dated February 2, 1989 (five days before the assignment applications were inadvertently granted and eight days before the assignment was consummated) in which it agreed to "accept conditions that might be imposed by the Commission on the renewal applications of the stations." Thus, the assignee was aware of the possibility that remedies might be imposed. Moreover, the current licensee consummated before grant of the assignment application became final and was thus on constructive notice that Commission review and imposition of sanctions was possible. Further, although the current licensee did not know what specific action the Commission would take on the stations' renewal applications, it did know, or through a diligent investigation as a potential buyer, should have known, that a questionable EEO program was being implemented at the stations. A review of the stations' EEO Program Report would have revealed that the licensee contacted few recruitment

sources which were likely to refer minorities. In addition, the licensee received few minority referrals. Next, a diligent investigation of the licensee's EEO efforts would have indicated that the licensee did not actively recruit for many of its positions during the renewal period and that the licensee could not verify its EEO efforts during any other time during which it operated the stations. Further, the stations' Annual Employment Reports for the past license term indicated that despite the fact that they were located in an area with a 35.2% minority labor force, few minorities, if any, had been employed at the stations. The totality of these circumstances should have put the assignee on notice that it was purchasing stations with a questionable EEO program, and that sanctions were distinct possibilities. Accordingly, we conclude that, in this case, application of the policy expressed in *Woolfson* was not inequitable.

11. At any rate, a buyer cannot receive any greater license rights than a seller is entitled to obtain. In this case, the Commission determined that renewal was in the public interest only on the conditions specified. Thus, the buyer could acquire no greater rights.

IV. CONCLUSION

12. We note that the factors which the Commission takes into account when determining the amount of a forfeiture penalty include the nature, circumstances, extent and gravity of the violations and, with regard to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require. 47 C.F.R. Section 1.80 (b)(3). After consideration of all these factors and taking into account the arguments put forth in the licensee's response and the assignee's petition, as addressed above, we find that the original *Letter* imposing a forfeiture of $12,000 on the former licensee and short-term renewal and reporting conditions on the assignee is appropriate.

V. ORDERING CLAUSES

13. Accordingly, *IT IS ORDERED*, that the petition for reconsideration filed by Radio Carolina Limited Partnership *IS DENIED*.

14. *IT IS FURTHER ORDERED*, that the "Response to the Notice of Apparent Liability" filed by MEG Associates, Ltd. *IS DENIED*, and pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b), that MEG Associates, Inc. *FORFEIT* to the United States the sum of twelve thousand dollars ($12,000) for the wilful and repeated violation of Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080. Payment of the forfeiture may be made by mailing to the Commission a check or different instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the former licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules and Section 504(a) of the Communications Act of 1934, as amended, as summarized in the attachment to this Order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] WMWG(FM)'s call letters were changed to WDAR-FM effective February 7, 1990.

[2] An application assigning the stations to Radio Carolina Limited Partnership was inadvertently granted by the staff on February 7, 1989, while the renewal applications were still pending. The sale was consummated on February 10, 1989. On March 17, 1989, the Commission, on its own motion, reviewed the action and granted the assignment of license applications conditioned on and subject to disposition of the then-pending renewal applications pursuant to Section 1.117(a) of its Rules, 47 C.F.R. Section 1.117(a). *See MEG Associates, Ltd.*, 4 FCC Rcd 2645 (1989).

[3] Upon grant of the renewal of licenses, the short-term renewal and reporting conditions passed to the assignee.

[4] The former licensee points to the fact that it is now under investigation by the State of South Carolina for possible EEO violations regarding a case where a white part-time employee was released to "make room" for a black full-time employee. The former licensee explains that it held the full-time position open for a year while it searched for a minority candidate.

[5] The current licensee also argues that the Commission erred in imposing sanctions for the former licensee's failure to keep EEO records for a period of four years, arguing that the Commission did not have the legal right to require the collection of such information. This issue was resolved in *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987), *petition for reconsideration pending; see also NAB Clarification*, 4 FCC Rcd 1715 (1989). The Commission stated that a licensee can be expected to possess the requested data, especially in light of the requirement that it engage in ongoing self-assessment of its EEO program. 4 FCC Rcd at 1716. *See also Applications for Renewal of License of Certain Broadcast Stations Serving Melbourne, Florida and Other Communities in the Florida Area*, 5 FCC Rcd 6738, 6742 n.11 (1990) (*WKLF/WEZY(FM)*).

[6] Our decision here is not inconsistent with cases the assignee cites as additional support for its position. *See Rules and Policies to Further the Advancement of Black Americans in Mass Communications*, 76 FCC 2d 385 (1980); *Bilingual-Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 628 (D.C. Cir. 1978); *National Broadcasting Company, Inc.*, 58 FCC 2d 419 (1976). These cases do not speak to the problems of enforcing the EEO Rule where an assignment is involved.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-48

In re Applications of

CARMEL BROADCASTING LIMITED PARTNERSHIP	File No. BPH-880208MK
LONE CYPRESS RADIO ASSOCIATES, INC.	File No. BPH-880210ML
HIGHLANDS BROADCASTING CO., INC.	File No. BPH-880211MK
PASO HONDO BROADCASTING LIMITED PARTNERSHIP, A CALIFORNIA LIMITED PARTNERSHIP	File No. BPH-880211ML
STODDARD JOHNSTON and SHERRIE McCULLOUGH d/b/a J & M BROADCASTING COMPANY	File No. BPH-880211MM
CAL TOWER BROADCAST GROUP	File No. BPH-880211MR

For Construction Permit for a New FM Station, Channel 238A, in Carmel, California

ORDER

Adopted: February 14, 1992; Released: February 26, 1992

By the Commission:

1. Before the Commission are an Application for Review filed August 29, 1991, by Carmel Broadcasting Limited Partnership (CBLP); an Opposition filed September 11, 1991, by Highland Broadcasting Co., Inc.; and a Petition for Leave to File Opposition Late and an Opposition both filed September 17, 1991, by Lone Cypress Associates, Inc.[1] These pleadings relate to a Review Board decision, *Carmel Broadcasting Limited Partnership*, 6 FCC Rcd 4633 (Rev.Bd. 1991), upholding the ALJ's order (FCC 91M-871, released March 8, 1991) dismissing CBLP's application. Having reviewed the ALJ's and the Board's decisions, the parties' pleadings, and the record, we find no reason to disturb the Board's decision.

2. There is, however, one matter raised by CBLP that warrants brief discussion. CBLP contends that the specification of abuse of process issues against it was error, and that an ALJ has no jurisdiction to try matters except pursuant to lawfully specified issues.[2] We find no merit to that contention. To begin with, we agree with the Board that applicants are not entitled to disobey an ALJ's orders merely because they believe the antecedent rulings upon which they were based were legally erroneous. *See* 6 FCC Rcd 4633 and 4634 ¶ 7, citing *Scioto Broadcasters, Limited Partnership*, 5 FCC Rcd 5902 (1990). As we explained in *Lorraine Walker Arms*, 5 FCC Rcd 7013 (1990), no hearing system can function effectively if parties deliberately disregard ALJ's orders; if we were to permit such a practice, our ALJs would be reduced to impotence and the Commission's hearings to chaos. In any event, we are not persuaded that the ALJ abused his discretion in adding the requested issues. The ALJ had before him a petition filed by another applicant in this case alleging that Osborne was the real party behind CBLP and that CBLP was therefore not a *bona fide* limited partnership. In support of those allegations, the petitioner contended that Osborne's involvement in CBLP was similar to his involvement in a limited partnership applicant for a new FM station in the Fresno, California proceeding, which the Review Board found was not a *bona fide* applicant (*Carta Corporation*, 5 FCC Rcd 3596, 3702 ¶ 18 (1990)). The Board there noted that Osborne was also involved in a similar application in the Irondequoit proceeding and that his conduct in the two cases raised questions regarding Osborne's "modus operandi" which could be considered in other proceedings in which he is involved (*id.* at 3705 n.13).

3. As the ALJ stated, there were allegations in this case that Osborne was again participating in a non *bona fide* limited partnership applicant, and there were striking similarities in the Irondequoit, Fresno and Carmel applications. While CBLP contends that allegations of misconduct were rejected in connection with the assignment of the Irondequoit permit, see letter dated February 26, 1990 from the Chief, Audio Services Division, Mass Media Bureau, we agree with the ALJ that the Bureau's determination is not dispositive here. The Bureau did not consider the similarity of that case to subsequent proceedings. Additionally, notwithstanding the Bureau's determination, the fact that the Irondequoit applicant was willing to assign its permit to its nominal limited partner only four months after termination of that proceeding raises concerns. This circumstance considered in combination with both the subsequent determination that the Fresno applicant was not *bona fide* and the allegations concerning the *bona fides* of CBLP's proposal in this proceeding, gave an adequate *prima facie* basis for an inquiry to determine whether the motivation underlying the filing of CBLP's application was to gain credit for a proposal that it did not intend to effectuate. [3] Under these circumstances, we reject CBLP's contention that the ALJ erred in concluding that there were substantial and material questions of fact of substantial public interest importance warranting a full evidentiary hearing concerning Osborne's role in CBLP.

4. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 C.F.R. § 1.115(g), the Application for Review filed August 29, 1991, by Carmel Broadcasting Limited Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Lone Cypress' petition to file opposition two business days late due to a previous fire and ancillary disruption in the building housing its counsel is granted for good cause shown and its opposition is accepted.

[2] The issues specified were to determine whether Frederick R. L. Osborne, president and majority stockholder of Auburn Cablevision, Inc., the purported limited partner in CBLP, had abused the Commission's processes in other comparative hearing proceedings (*e.g.* Irondequoit, New York, MM Docket No. 80-517 and Fresno, California, MM Docket No. 88-21) and/or in this proceeding, and, if so, the effect thereof on CBLP's basic qualifications to be a licensee. FCC 90M-3695, released November 23, 1990. Because CBLP failed to produce Osborne at hearing, as required by the ALJ, its application was dismissed. In this regard, we agree with the Board that Osborne's withdrawal as a principal did not moot the significance of his prior participation in CBLP's proposal. *See* 6 FCC Rcd at 4634 ¶¶ 8-9; and *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1178, 1218 ¶ 78 (1986).

[3] *See Inquiry Into Alleged Abuses of the Commission's Processes by Applicants for Broadcast Facilities*, 4 FCC Rcd 6342 (1989), and *Kansas Broadcast Limited Partnership*, 4 FCC Rcd 4640 (MMB 1989) (proceedings specified to determine whether pattern of conduct constitutes an abuse of the Commission's processes); and *WWOR-TV, Inc.*, 6 FCC Rcd 1524 (1991) (remanding for further proceedings to determine if the applicant's motives in filing its application were *bona fide*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Temporary Waiver of the Maritime Services Rules (Part 80) to Permit the use of VHF Maritime Channel 9 as a Secondary Calling Channel in the First Coast Guard District.

ORDER

Adopted: February 19, 1992; Released: February 26, 1992

By the Deputy Chief, Private Radio Bureau:

1. On August 17, 1990, the Private Radio Bureau adopted an *Order*, 5 FCC Rcd 2d 5276 (1990), waiving Section 80.373(f) of the Commission's Rules, 47 C.F.R. § 80.373(f), to permit, on a temporary two-year basis, the use of marine VHF channel 9 for calling in Boston Harbor. [1] The waiver was limited in scope to non-commercial operations, *e.g.*, pleasure boats, and permitted such boats to use channel 9 instead of channel 16, the channel internationally designated for safety, distress and calling purposes.

2. This waiver was issued in conjunction with the Commission's *Notice of Proposed Rule Making*, PR Docket No. 91-167, 6 FCC Rcd 3484 (1991), to permit the use of channel 9 as a second calling channel. We noted that congestion on channel 16 is caused primarily by the large increase in the number of recreational boaters and is a long standing concern of the Commission. Among other things, the waiver allowed the Commission and the Coast Guard to conduct a study in Boston Harbor on the effects of permitting channel 9 to be used as a second calling channel.

3. The results of the joint Coast Guard-Commission study have been very positive. The Commission's Field Operations Bureau (FOB), Boston, Massachusetts, field office reports that congestion on channel 16 was dramatically reduced as a result of allowing use of channel 9 for routine calling. [2] Further, the Coast Guard and the Boston field office reported that no safety problems occurred as a result of use of channel 9 as a second calling channel.[3]

4. The Coast Guard has requested a similar waiver to expand the use of channel 9 as a second calling channel beyond Boston, to the entire First District. [4] In its request, the Coast Guard states that the success of the use of channel 9 in Boston Harbor has been so great that it seeks to implement a second calling channel across the First District for use effective April 1, 1992. [5] The Coast Guard's request is substantively the same as the waiver now in effect in Boston Harbor. Further, the Coast Guard is prepared to coordinate with FCC field office engineers, their own public affairs staff, auxiliary staff and group commanders, to ensure that the use of channel 9 in the First District is well-publicized and properly implemented.

5. Granting the waiver request to expand the coverage area at this time will permit the Coast Guard to publicize and implement the use of a second calling channel at the start of the boating season in the First District. It is intended that this will encourage a smooth and efficient transition from the use of channel 16 to channel 9 for non-emergency calling and will reduce congestion and will thus improve VHF marine communications. We find that permitting the immediate use of channel 9 as an alternative, optional calling channel, pending final action of the Commission in PR Docket No. 91-167, is therefore in the public interest and constitutes good cause to issue this waiver. Consistent with the use of channel 9 for calling by eligible vessels, we are also waiving the channel 16 watch requirement for those vessels choosing to use channel 9 under this Order. [6]

6. IT IS THEREFORE ORDERED, pursuant to authority contained in Sections 0.331 and 1.3 of the Commission's Rules, 47 C.F.R. §§ 0.331, 1.3, that Section 80.373(f) of the Commission's Rules, 47 C.F.R. § 80.373(f), IS WAIVED, pending final action of the Commission in PR Docket No. 91-167, to the extent that marine VHF channel 09 (156.450 MHz) may be used as a non-distress calling channel in the First Coast Guard District of the Northeastern region of the United States, by non-commercial users, in lieu of marine VHF channel 16 (156.800 MHz).

7. IT IS FURTHER ORDERED THAT, Sections 80.148, 80.310, and 80.1153 of the Commission's Rules, 47 C.F.R. §§ 80.148, 80.310, and 80.1153, ARE WAIVED, pending final action of the Commission in PR Docket No. 91-167, to the extent that vessels using marine VHF channel 09 for routine calling in the First Coast Guard District may alternatively monitor channel 9 in lieu of channel 16.

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[1] In the Maritime Radio Services, a calling channel is used as a gateway to other working channels. That is, a ship listens on the designated calling channel for a call, acknowledges the call on that channel and then switches to a working channel to continue its communication.

[2] Monitoring for the 1991 boating season, when compared to similar samples taken during 1990, shows a 49% reduction in channel 16 congestion during peak weekend usage, a 59% overall reduction during holidays and weekends, and a 42% reduction on weekdays. The study further shows that during the 1990 boating season, channel 16 was occupied 23% of the time. In 1991, that time was reduced to 9.6%. *See* FOB Memorandum, Testing of VHF Maritime Channel 9 as a Secondary Calling Channel in Boston Harbor, December 16, 1991.

[3] *Id.*, at 3.

[4] The First Coast Guard District, encompasses an area in the Northeastern United States extending from the Toms River, New Jersey to the Maine-Canadian border, with inland boundaries west to Lake Champlain, New York.

[5] *See* letter from Captain K. W. Thompson, Commander First Coast Guard District, to Mr. Joseph P. Casey, Federal Communications Commission, Field Operations Bureau, December 5, 1991.

[6] *See* Sections 80.148, 80.310, and 80.1153 of the Commission's Rules, 47 C.F.R. §§ 80.148, 80.310, 80.1153.

FEDERAL COMMUNICATIONS COMMISSION

Beverly G. Baker
Deputy Chief, Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-545

In the Matter of

Amendment of Section 73.202(b), RM-7504
Table of Allotments,
FM Broadcast Stations.
(Copperas Cove, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 12, 1992; Released: February 27, 1992

By the Assistant Chief, Allocations Branch:

1. At the request of Cove Broadcasting Company ("petitioner"), former licensee of Station KOOV-FM,[1] Copperas Cove, Texas, the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 6708 (1990), proposing the substitution of Channel 276C3 for Channel 276A at Copperas Cove, Texas, and modification of the license of Station KOOV-FM to specify operation on the higher powered channel. Petitioner filed comments stating its intention to apply for channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 276C3 for Channel 276A at Copperas Cove, since it could enable Station KOOV-FM to expand it coverage area. Channel 276C3 can be allotted to Copperas Cove in compliance with the Commission's minimum distance separation requirements with a site restriction of 14.8 kilometers (9.2 miles) southwest to avoid a short-spacing to a construction permit (BPH-910404IC) for Station KWOW-FM, Channel 277C3, Clifton, Texas.[2] However, the issuance of a license for Channel 276C3 may be withheld until Station KCRM-FM, Channel 276A, Cameron, Texas, is licensed on Channel 280C2.[3] As proposed, we will also modify Station KOOV-FM's license to specify operation on Channel 276C3 in accordance with the provisions of Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 13, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Copperas Cove, Texas	276C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Centroplex Communications, Inc., for Station KOOV-FM, Copperas Cove, Texas, IS MODIFIED to specify operation on Channel 276C3, in lieu of Channel 276A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Centroplex Communications, Inc., licensee of Station KOOV-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Report and Order* to the licensee of Station KCRM-FM, Cameron, Texas, as follows: KCRM Broadcasting, 110 Wild Basin Road, Austin, Texas 78716.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

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[1] Centroplex Communications, Inc. is now the licensee of Station KOOV-FM pursuant to the Commission's grant of the assignment of petitioner's license on December 19, 1991, and consummation on January 2, 1992.

[2] The coordinates for Channel 276C3 at Copperas Cove are North Latitude 31-03-19 and West Longitude 98-02-00.

[3] Station KCRM-FM was modified from Channel 276A to Channel 280C2 in MM Docket No. 87-209. *See* 3 FCC Rcd 5897 (1988). A construction permit has been issued to Station KCRM-FM specifying operation on Channel 280C2 (BPH-910426JK). We will serve the licensee of Station KCRM-FM with a copy of this *Report and Order*.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-532

In the Matter of

Amendment of Section 73.202(b),	RM-7199
Table of Allotments,	RM-7597
FM Broadcast Stations.	
(Sheldon, Iowa, and Jackson and	
Springfield, Minnesota)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 12, 1992; Released: February 27, 1992

By the Assistant Chief, Allocations Branch:

1. At the request of Sheldon Broadcasting Company, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making and Order to Show Cause*, 5 FCC Rcd 6621 (1990), proposing the substitution of Channel 287C2 for Channel 288A at Sheldon, Iowa, and the modification of its license for Station KIWA-FM to specify the higher class channel. To accommodate the allotment at Sheldon, the *Notice* also proposed the modification of Station KRAQ's license by substituting Channel 289A for Channel 287A at Jackson, Minnesota, and the modification of Station KLPR's construction permit by substituting Channel 234A for Channel 289A at Springfield, Minnesota. Comments were filed by the petitioner. A counterproposal was filed by Jackson Broadcasting Co. ("JBC") requesting the allotment of Channel 289C3 instead of Channel 289A at Jackson, Minnesota, and the modification of Station KRAQ's license accordingly.[1] No other comments were received.

2. Petitioner, in its comments, reiterates its intention to apply for Channel 287C2, if allotted to Sheldon, and to reimburse the licensee of Station KRAQ and the permittee of Station KLPR for the reasonable costs associated with their respective channel changes. JBC, in its counterproposal, states that Channel 289C3 can be allotted to Jackson in compliance with the Commission's minimum distance separation requirements if the Springfield channel is changed as proposed in the *Notice*. JBC also states that it willing to share Station KLPR's reimbursement costs with the petitioner.

3. We believe the public interest would be served by substituting Channel 287C2 for Channel 288A at Sheldon, Iowa, and Channel 289C3 for Channel 287A at Jackson, since it could provide both communities with wide coverage area FM services and also enable Stations KIWA-FM and KRAQ to expand their service areas. We will also substitute Channel 234A for Channel 289A at Springfield, Minnesota, and modify Station KLPR's construction permit accordingly, to accommodate the upgrades and Sheldon and Jackson. James Ingstad Broadcasting, Inc., permittee of Station KLPR, did not file comments in this proceeding and thus is deemed to have consented to the modification of the station's operating channel. In accordance with Section 1.420(g) of the Commission's Rules, we will also modify petitioner's license for Station KIWA-FM and JBC's license for Station KRAQ to specify operation on Channels 287C2 and 289C3, respectively. Commission policy requires that the party benefitting from a channel change reimburse the affected party. Therefore, since allotment of both Channel 287C2 at Sheldon and Channel 289C3 at Jackson require the deletion of Channel 289A from Springfield, both the petitioner and JBC are required to share equally in the reimbursement costs due Station KLPR for the change in the station's operating channel. In addition, petitioner is required to reimburse Station KRAQ for the reasonable costs associated with its change from Channel 287A to Channel 289A. The cost of improving Station KRAQ's facilities from Class A to Class C3, however, are not subject to reimbursement.

4. Channel 287C2 can be allotted to Sheldon in compliance with the Commission's minimum distance separation requirements at Station KIWA-FM's transmitter site. Channel 289C3 can be allotted to Jackson at the site specified in its outstanding application (BMPH-900823IC). Channel 234A can be allotted to Springfield at Station KLPR's licensed transmitter site.[2]

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 13, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Sheldon, Iowa	287C2
Jackson, Minnesota	289C3
Springfield, Minnesota	234A

6. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the licenses of Sheldon Broadcasting Company, Inc., for Station KIWA-FM, Sheldon, Iowa, and Jackson Broadcasting Co. for Station KRAQ, Jackson, Minnesota, ARE MODIFIED to specify operation on Channels 287C2 and 289C3, respectively, in lieu of Channels 288A and 287A, respectively, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensees shall submit to the Commission a minor change application for a construction permit (Form 301).

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[1] Public Notice of the counterproposal was given on January 14, 1991, Report No. 1833.

[2] The coordinates for Channel 287C2 at Sheldon are North Latitude 43-11-00 and West Longitude 95-52-05. The coordinates for Channel 289C3 at Jackson are 43-36-54 and 94-57-48. The coordinates for Channel 234A at Springfield are 44-14-13 and 95-06-20.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of James Ingstad Broadcasting, Inc., for Station KLPR, Springfield, Minnesota, IS MODIFIED to specify operation on Channel 234A in lieu of Channel 289A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station KLPR's construction permit, BPH-881221MD, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with construction permit BPH-881221MD, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

8. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the permittee, as follows: James Ingstad Broadcasting, Inc., Station KLPR, 210-1/2 N. Minnesota Street, P.O. Box 368, New Ulm, Minnesota 56073.

9. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Sheldon Broadcasting Company, Inc., licensee of Station KIWA-FM, and Jackson Broadcasting Co., licensee of Station KRAQ, are required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-218

In the Matter of

Amendment of Section 73.202(b),	RM-7752
Table of Allotments,	RM-7816
FM Broadcast Stations.	
(Charleston and Marble Hill,[1]	
Missouri)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 13, 1992; Released: February 27, 1992

By the Assistant Chief, Allocations Branch:

1. In response to a petition filed by Dianne Anderson ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 6 FCC Rcd 4396 (1991), seeking the substitution of FM Channel 291C2 for Channel 291A at Charleston, Missouri. Petitioner also requests modification of her construction permit (BPH-880324OG) for Station KWKZ to specify operation on Channel 291C2. In response to the *Notice*, CLC Broadcasting Company ("CLC") filed a counterproposal.[2] Petitioner filed comments supporting the allotment of Channel 291C2 at Charleston. Petitioner also filed reply comments.

2. CLC's counterproposal requests the allotment of Channel 292A to Marble Hill, Missouri. In su port of its proposal, CLC states that the allotment of Channel 292A will be a first local service for the community. Further, Marble Hill is an incorporated community and the county seat of Bollinger, Missouri.[3] CLC stated it will promptly file an application for a channel at Marble Hill and if granted the construction permit, will construct a station and commence broadcast operations.

3. In reply comments, petitioner continues to support the substitution at Charleston. In response to the counterproposal filed by CLC, petitioner suggests the allotment of Channel 247A or Channel 259A to Marble Hill. Petitioner asserts that such action would provide the greatest amount of new FM service, giving Marble Hill its first FM allotment while providing expanded service in the Charleston area.

4. After consideration of the material filed in this proceeding, we believe the public interest would be served by the substitution of Channel 291C2 for Channel 291A at Charleston. The substitution can be made in compliance with the Commission's spacing requirements at petitioner's specified site 18.5 kilometers (11.5 miles) west of the community.[4] The grant of a license for Channel 291C2 at Charleston may be withheld until Station KMIS-FM, Channel 292A, Portageville, Missouri, is licensed on Channel 293C2 at New Madrid, Missouri, pursuant to the *Report and Order* in MM Docket No. 91-43, 6 FCC Rcd 4398 (1991). Currently, Channel 291C2, Charleston, is short-spaced to Channel 292A, Portageville, Missouri. In accordance with Section 1.420(g) of the Rules, we shall modify the construction permit for Station KWKZ to specify operation on Channel 291C2 in lieu of Channel 291A. In response to the counterproposal, we believe it would be in the public interest to allot a channel to Marble Hill. A staff analysis has determined that Channel 247A can be allotted to Marble Hill, Missouri, in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules without a site restriction.[5]

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 13, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

Community	Channel No.
Charleston, Missouri	291C2
Marble Hill, Missouri	247A

6. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Station KWKZ, Charleston, Missouri, IS MODIFIED to specify operation on Channel 291C2 in lieu of Channel 291A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

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[1] The community of Marble Hill has been added to the caption.

[2] Public notice of the counterproposal was given on October 7, 1991, Report No. 1863 (RM-7816).

[3] The *Rand McNally Commercial Atlas* indicates that Marble Hill has a post office, zip code and banks. The 1980 Census indicates the community has a population of 1,466 people.

[4] The coordinates for Channel 291C2 at Charleston are 36-56-30 and 89-33-00.

[5] The coordinates for Channel 247A at Marble Hill are 37-18-24 and 89-58-12.

7. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Dianne Anderson, permittee of Station KWKZ, is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

8. The window period for filing applications for Channel 247A, Marble Hill, Missouri, will open on **April 14, 1992,** and close on **May 14, 1992.**

9. IT IS FURTHER ORDERED, That the Secretary of the Commission Shall Send by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

New Madrid County Broadcasting Company

Station KMIS-FM

P.O. Box 250

Portageville, Missouri 63873

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-29

In the Matter of

Amendment of Section 73.202(b), RM-7774
Table of Allotments,
FM Broadcast Stations.
(Washington, Louisiana)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 13, 1992; Released: February 27, 1992

Comment Date: April 20, 1992
Reply Comment Date: May 5, 1992

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Dee Broadcasting Corporation ("petitioner"), licensee of Station KNEK-FM, Channel 284A, Washington, Louisiana, requesting the substitution of Channel 284C3 for Channel 284A at Washington and modification of its license for Station KNEK-FM to specify operation on the higher powered channel.[1]

2. We believe the public interest would be served by proposing the substitution of Channel 284C3 for Channel 284A at Washington, Louisiana, since it could provide the community with a wide coverage area FM service. Channel 284C3 can be allotted to Washington in compliance with the Commission's minimum distance separation requirements with a site restriction of 21.0 kilometers (13.0 miles) southwest to accommodate petitioner's desired site.[2] Channel 284C3 is short-spaced to Station KROF-FM, Channel 285A, Abbeville, Louisiana, and Station KICR-FM, Channel 285A, Oakdale, Louisiana. However, Station KROF-FM was ordered to Channel 286C3 in MM Docket No. 89-389 and Station KICR-FM was ordered to Channel 254C2 in MM Docket No. 88-47. *See* 5 FCC Rcd 5666 (1990) and 3 FCC Rcd 5815 (1988), respectively. Therefore, final licensing of Station KNEK-FM at Washington may be delayed until Station KROF-FM is licensed on Channel 286C3 and Station KICR-FM is licensed on Channel 254C2. We will serve the licensees of Station KROF-FM and Station KICR-FM with a copy of this *Notice of Proposed Rule Making*. As requested, we also propose to modify petitioner's license for Station KNEK-FM to specify operation on Channel 284C3. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of channel at Washington or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Washington, Louisiana	284A	284C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Notice* by Certified Mail, Receipt Requested, to Abbeville Broadcasting Service, Inc., P.O. Box 620, Abbeville, Louisiana, 70510 (licensee of Station KROF-FM), and B & D Communications, 3100 US 165 North, Monroe, Louisiana 71211 (licensee of Station KICR-FM).

6. Interested parties may file comments on or before **April 20, 1992,** and reply comments on or before **May 5, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Peter Gutmann, Esq.
Pepper & Corazzini
1776 K Street, N.W.
Washington, D.C. 20006

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by

[1] We note that petitioner has failed to state it will apply for Channel 284C3, if allotted. An expression of interest is required before a channel can be allotted, and absent of such an expression of interest, it is Commission's policy to refrain from allotting the channel. *See e.g., Murray, Kentucky*, 3 FCC Rcd 3016 (1988) and *Pine, Arkansas*, 3 FCC Rcd 1010 (1988). Therefore, petitioner is requested to clarify this matter when submitting its comments.

[2] The coordinates for Channel 284C3 at Washington are North Latitude 30-26-45 and West Longitude 92-09-24.

the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-610

In the Matter of

Amendment of Section 73.202(b),	RM-7547
Table of Allotments,	RM-7642
FM Broadcast Stations.	
(Stamford and Whitesboro, New York)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 18, 1992; Released: February 27, 1992

By the Assistant Chief, Allocations Branch:

1. At the request of Carmine M. Iannace ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 7566 (1990), proposing the allotment of Channel 250A to Stamford, New York, as its first local aural transmission service. Petitioner filed comments in support of the proposal reaffirming his intention to apply for the channel, if allotted. Craig L. Fox ("Fox") filed a counterproposal proposing the allotment of Channel 250A at Whitesboro, New York, as its first local aural transmission service.[2] Petitioner filed reply comments. Towpath Communications Limited ("Towpath"), permittee of Station WOWB(FM), Channel 288A, Little Falls, New York, filed a petition to defer action and reply comments.[3]

2. In its counterproposal, Fox proposes the allotment of Channel 250A at Whitesboro in lieu of Stamford as its first local aural transmission service. Fox submits that Whitesboro is located in Oneida County and has a population of 4,460.[4] Fox states that he will apply for the channel, if allotted.

3. In reply comments, petitioner argues that it would be in the public interest to allot Channel 250A to Stamford (population 1,240) because it would serve areas that are presently underserved by existing full-time radio stations, whereas Whitesboro would not serve any areas that are not already served by at least five existing full-time radio stations. Additionally, petitioner submits that Stamford is an autonomous community separate from any other community's "area of influence. " Stamford presently has no local radio transmission service, whereas Whitesboro is a suburb of Utica, a much larger city, which has ten licensed radio stations.

4. After reviewing the proposals, we believe that both communities are deserving of their first local aural transmission service. However, an engineering analysis reveals that there are no alternate Class A channels available for Stamford or Whitesboro. Therefore, our decision will be based on the allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), which are:

(1) First full-time aural service;

(2) Second full-time aural service;

(3) First local service;

(4) Other public interest matters.

[Co-equal weight given on priorities (2) and (3)]

5. Neither petitioner nor Fox has claimed that the allotment of Channel 250A at either community would provide any first or second full-time aural service, but the allotment could provide each with its first local aural transmission service. Therefore, in determining which community should receive the allotment, we have looked at other factors such as the availability of reception services and populations. A Commission engineering analysis indicates that both communities are well-served by reception services, with Stamford receiving 10 aural services and Whitesboro receiving 23.[5] In addition, we note that Whitesboro (population 4,460) is larger than Stamford (population 1,240). Given the fact that each community is served by a number of stations, we believe the new allotment should be made to Whitesboro as the larger of the two communities. *See, e.g., West Liberty and Richmond, Ohio*, 6 FCC Rcd 6084 (1991); *Bostwick and Good Hope, Georgia*, 6 FCC Rcd 5796 (1991); and *Three Oaks and Bridgman, Michigan*, 5 FCC Rcd 1004 (1990).

6. Channel 250A can be allotted to Whitesboro in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[6] Concurrence of the Canadian government has been obtained, since Whitesboro is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections

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[1] The community of Whitesboro has been added to the caption.

[2] Public Notice of Fox's counterproposal was given on February 15, 1991, Report No. 1838.

[3] Towpath's petition to delay and its untimely filed reply comments regarding a line-of-sight problem with the proposed allotment of alternate Channel 287A at Stamford are moot, given our resolution in this proceeding.

[4] All population figures taken from the 1980 U.S. Census.

[5] Stamford and Whitesboro both receive AM service from Stations WROW, Albany, New York and WGY, Schenectady, New York. Stamford also receives AM service from WCKL, Catskill, New York, WFAN, New York, New York, WDOS, Oneonta, New York, WGHQ, Kingston, New York, WSCM, Cobleskill, New York, and WDLA, Walton, New York. Whitesboro also receives AM service from Stations WSYR and WHEN, Syracuse, New York, WBRV, Boonville, New York, WIBX, WRUN, WTLB and WUTQ, Utica, New York, WLFH, Little Falls, New York, WRNY, Rome, New York, WYUT, Herkimer, New York and WADR, Remsen, New York. Stamford receives FM service from Stations WDHI, Delhi, New York and WJIV, Cherry Valley, New York. Whitesboro receives FM service from Stations WYUT-FM, Herkimer, New York, WIBQ-FM, Remsen, New York, WKLL, Frankfort, New York, WFRG and WUUU, Rome, New York, WOUR, WLZW, WEIF, WKGW and WRCK, Utica, New York.

[6] The coordinates for Channel 250A at Whitesboro are North Latitude 43-07-19 and West Longitude 75-17-31.

0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 13, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Whitesboro, New York	250A

8. The window period for filing applications will open on **April 14, 1992,** and close on **May 14, 1992.**

9. IT IS FURTHER ORDERED, That the proposal of Carmine M. Iannace (RM-7547) to allot Channel 250A to Stamford, New York, IS DENIED.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-230

In the Matter of

Amendment of Section 73.202(b), RM-7753
Table of Allotments,
FM Broadcast Stations.
(Graham, Washington)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 18, 1992; Released: February 27, 1992

By the Assistant Chief, Allocations Branch:

1. At the request of Brian J. Lord, d/b/a Skywave Broadcasting Company ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 4754 (1991), issued in response to a petition for rule making proposing the allotment of Channel 285A to Graham, Washington, as its first local aural transmission service. Petitioner filed comments in support of the proposal reaffirming its intention to apply for the channel, if allotted.[1] Michael T. McKenna ("McKenna") filed an untimely counterproposal requesting the allotment of Channel 285A at McKenna, Washington, as the community's first local aural transmission service.[2] Fatima Crusade Educational Radio Foundation ("Fatima") filed opposing comments and an untimely counterproposal requesting that the Commission allot Channel 285A to Eatonville, Washington, as the community's first local aural transmission service.[3] Fatima also requested that Channel 285A be reserved for noncommercial educational use only. Petitioner filed reply comments.

2. Petitioner submits that Graham is in Pierce County and has several businesses, including a large new shopping center, a post office and zip code, and many new homes are being constructed. Petitioner also states Graham is the fastest growing area in the county. Petitioner contends that the Boeing Company will build a new manufacturing facility in the neighboring area of Frederickson which will employ 5000 workers, many of whom will live in housing being constructed in the Graham area.

3. The *Notice of Proposed Rule Making* in this proceeding did not specifically request petitioner to provide further information to demonstrate that Graham has social, economic, cultural and governmental indicia to qualify it as a "community" for allotment purposes. We should have done so, as Graham is not listed in the U.S. Census or incorporated. The *1991 Rand McNally Commercial Atlas* states that Graham has a population of 150 persons, a bank, post office and its own zip code. Ordinarily, we would issue a *Request for Supplemental Information* requesting that petitioner provide information to show that Graham qualifies as a "community." However, as noted in the previous paragraph, petitioner has submitted information attesting to Graham's community status. Therefore, we do not believe that solicitation of additional information at this time would be beneficial in reaching a decision in this case.

4. Based upon the showing submitted by petitioner, we do not believe that Graham is a "community" for allotment purposes. It appears that there is no local government in Graham. Although petitioner has stated that Graham has "several businesses," he has not specifically identified any businesses or other organizations which identify themselves with Graham or shown that these organizations are intended to serve the needs of Graham as opposed to other areas. While homes may be under construction, petitioner offers no evidence as to whether they are being constructed in Graham. In the past, the Commission has rejected claims of community status where a connection has not been shown between political, social and commercial organizations and the community in question. *See Gretna, Marianna, Quincy and Tallahassee, Florida*, 6 FCC Rcd 633 (1991) and cases cited therein. While the *1991 Rand McNally Commercial Atlas* lists Graham with a population of 150 persons, mere geographical location is not sufficient to establish "community" status. *See Vimville, Mississippi*, 48 FR 5974 (1983). We note that Graham has a post office and a zip code. However, the presence of a post office and a zip code is not sufficient to establish community status. *See Coker, Alabama* , 43 RR 2d 190 (1978). In sum, petitioner has not sufficiently shown indicia of community status such as political, social or business organizations, or provided the testimony of local residents attesting to Graham's community status. *See Memorandum Opinion and Order (Semora, North Carolina and South Boston, Virginia)*, 5 FCC Rcd 934

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[1] Informal comments were also received from James Almy, publisher of *The South Pierce County Dispatch and Buyer's Guide*, in Eatonville, Washington. The comments were not filed pursuant to Commission Rules 1.415 and 1.420 and, therefore, will not be considered herein.

[2] McKenna's untimely filed counterproposal is technically and procedurally defective and was not placed on public notice. First, it was filed after the filing date for initial comments and is, therefore, untimely. *See* Section 1.420(d) of the Commission's Rules. In addition, McKenna failed to verify his pleading pursuant to Section 1.52 of the Commission's Rules. McKenna also failed to include any technical information to support his claim that the channel could be allotted to McKenna. *See* Section 1.401(c) of the Commission's Rules. Therefore, McKenna's counterproposal is unacceptable and will not be considered herein, and petitioner's responsive comments thereto will not be discussed.

[3] Fatima's counterproposal was filed after the comment period and is, therefore, untimely. *See* Section 1.415 of the Commission's Rules. Thus, Fatima's counterproposal will not be considered in this proceeding. However, we will consider Fatima's proposal in a separate *Notice of Proposed Rule Making*. Accordingly, we need not consider petitioner's reply comments to the extent that they address the merits of Fatima's counterproposal.

We note that Fatima's counterproposal was inadvertently placed on Public Notice on October 28, 1991, Report No. 1866 (RM-7843).

(1990). In view of the foregoing, we find that there is insufficient factual basis to conclude that Graham is a "community" for allotment purposes.

5. Accordingly, IT IS ORDERED, That the petition of Brian J. Lord, d/b/a Skywave Broadcasting Company (RM-7753), IS DENIED.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-543

In re Applications of

ESTEBAN DON LIZARDO & MATT FRANICH d/b/a LIZARDO-FRANICH PARTNERSHIP	File No. BPH-871109MF
SUSAN MARSZAL	File No. BPH-871110ME
MEDIA WEST BROADCAST GROUP, INC.	File No. BPH-871110MF
OLD TOWN BROADCASTING CORPORATION	File No. BPH-871110MI
RIO AMERICANO COMMUNICATIONS CORP.	File No. BPH-871110MM
ONE-O-THREE BROADCASTING CO., INC.	File No. BPH-871110MT
OLYMPIC BROADCASTERS, INC.	File No. BPH-871110MY
FAHLDA BROADCASTING COMPANY, A CALIFORNIA LIMITED PARTNERSHIP	File No. BPH-871110NB
OLD SACRAMENTO BROADCASTING CO., INC.	File No. BPH-871110NJ
JAM FM LIMITED PARTNERSHIP	File No. BPH-871110NL
JACK L. POWELL	File No. BPH-871110NM
SACRAMENTO FM BROADCASTERS LIMITED PARTNERSHIP	File No. BPH-871110NQ
GEORGE K. FUNG	File No. BPH-871110NU

For Construction Permit for a New FM Station on Channel 278A in Sacramento, California

Appearances

John J. Schimmenti, on behalf of Lizardo-Franich Partnership; *Peter A. Casciato*, on behalf of Susan Marszal; *Michael J. Wilhelm*, on behalf of Media West Broadcast Group, Inc.; *David Tillotson*, on behalf of Old Town Broadcasting Corporation; *William E. Zimsky*, on behalf of Rio Americano Communications Corp.; *Forrest Maurer*, on behalf of One-O-Three; *B. Jay Baraff and Lee J. Peltzman*, on behalf of Olympic Broadcasters, Inc.; *David Honig* on behalf of Fahlda Broadcasting Company, A California Limited Partnership; *Robert Lewis Thompson* and *Howard J. Barr*, on behalf of Old Sacramento Broadcasting Co., Inc.; *Stephen Diaz Gavin and Paula Perrone*, on behalf of JAM FM Limited Partnership; *David D. Oxenford, Jr.*, on behalf of Jack L. Powell; *Edward P. Taptich, Francis E. Fletcher, Jr.* and *Catherine Grofer Withers*, on behalf of Sacramento FM Broadcasters Limited Partnership; *Christopher D. Imlay and Julian P. Freret*, on behalf of George K. Fung and *Paulette Laden*, on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD LUTON

Issued: February 20, 1992; Released: March 2, 1992

I. PRELIMINARY STATEMENT

1. This proceeding began with twenty-four mutually exclusive applicants for FM Channel 278A in Sacramento, California. Through various means, the number of applicants has narrowed to those listed in the caption. The hearing in this matter, held July 10 to 18, 1990, was on the standard comparative issues, as follows:[1]

> (1) To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> (2) To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

II. FINDINGS OF FACT

Lizardo-Franich Partnership

2. Lizardo Franich Partnership is a general partnership organized under the laws of the State of California. Matt Franich and Esteban Don Lizardo are each 50% general partners. Lizardo-Franich Ex. 1.

3. In exchange for a 50% interest in the general partnership, Mr. Franich has agreed to contribute $400,000.00 in cash to apply for, construct, and operate the station for a two year period. Lizardo-Franich Partnership Agreement attached to Lizardo Franich Exhibit 1. In exchange for his 50% partnership interest, Mr. Lizardo will be the president and general manager of this station for two

years, and will be paid no salary. In addition to the written partnership agreement, there is also an unwritten agreement between the partners that Mr. Lizardo will be permitted to reside rent free at Mr. Franich's Carmichael, California, residence while working at the station and will be paid a small stipend or living allowance. Tr. 64.

4. It is proposed that Mr. Lizardo will devote 40 hours or more each week to the day to day operation of the proposed station as president and general manager. Lizardo-Franich Exhibit 2 at 1. Mr. Lizardo testified at hearing that he has no conception of what his duties as general manager will be. Tr. 57.

5. Mr. Lizardo, a Hispanic male, graduated from law school approximately one year ago (Tr. 64) and is currently employed in Los Angeles by the Downtown Legalization Project. Tr. 47. He works about sixty hours a week at this job. Tr. 58. He testified that he will discontinue this work so as to work full-time at the station. Tr. 57. Additionally, he is on the board of directors of public radio station KPFK in Los Angeles, California. Mr. Lizardo testified at hearing that he will devote full-time to operating the proposed station, but did not know how long this full-time commitment would last. After the two year period defined in the partnership agreement, he will re-evaluate his position. Tr. 58.

6. Mr. Franich has proposed to devote at least forty hours a week to the day-to-day operation of the station. Lizardo-Franich Exhibit 2. He will be the "Vice President" of the station. Lizardo-Franich exhibits do not state what duties Mr. Franich will have as Vice President, and Lizardo-Franich presented no testimony or other record evidence in this regard. Tr. 90. Mr. Franich, was unable to explain why he held a corporate title in a general partnership. Tr. 75.

7. Mr. Franich currently has two residences, one in the Sacramento area in Carmichael, California, and one in Palos Verdes, California, which is in southern California. Mr. Franich testified that until about seven years ago, he divided his time between these homes. Tr. 70-72. He testified that he now spends more time in Carmichael. Tr. 71. However, when asked how long he usually spends at each residence, he replied that he normally spends two months at a time at each location. Tr. 70-72. Consequently, he continues to spend about six months a year at each residence. He is a real estate developer and is able to run his businesses from either residence. Tr. 72. He spends about ten hours a week on his investments in southern California and about fifty hours a week on his Sacramento area investments. Tr. 72. He plans to continue to spend time on these investments if Lizardo-Franich is awarded the FM station. Tr. 73.

8. Lizardo-Franich proposes to install auxiliary power at both the studio and the transmitter to ensure against interruptions in service in the event of loss of commercial power. Lizardo-Franich Exhibit 4.

Susan Marszal

9. Marszal relied for her financial qualification on a letter from the American River Bank dated November 5, 1987. The letter recites that Ms. Marszal had requested a statement of the bank's "interest" in furnishing a loan, and goes on to state that the letter will serve as "an expression of [the bank's] interest in making such a loan available subject to the presentation of a complete loan package for the review and final approval of our loan committee." No loan package was assembled and no approval of the bank's loan committee was sought or obtained. According to Marszal's deposition testimony, the bank official with whom she spoke and who issued the letter "couldn't give a letter of commitment."

10. Subsequently, Marszal provided 1) a letter from the bank dated July 23, 1990, purporting to "confirm that the bank is willing to make" the needed loan to Marszal; and 2) a July 25, 1990, letter from Marszal to the bank in which Marszal expressed her willingness to meet the bank's requirements respecting collateral.

11. The following issue was specified against Marszal (*Order*, FCC 91M-1307 released January 11, 1991):

> Whether the letter from the American River Bank, dated November 5, 1987 and executed by William L. Young is a sufficient basis on which to conclude that Ms. Susan Marszal is financially qualified to construct her station and operate it for three months without reliance on revenue, and if not, the effect thereof on Ms. Susan Marszal's basis qualifications to be a Commission licensee.

12. On June 21, 1991, a one day hearing was held in which Willaim L. Young, President of the American River Bank, testified concerning: (1) the Bank's long standing relationship with Ms. Marszal (seven years); (2) its receipt and review of an entire loan package in 1987 (just prior to the filing of Ms. Marszal's application) including personal financial information concerning Ms. Marszal on the basis of which the Bank had granted Marszal and her husband a prior loan; (3) an appraisal of Ms. Marszal's residence (the collateral for the radio station loan) prior to grant of that loan (Tr. 1347); (4) the present value of her home; (Tr. 1348); the Bank's follow-up letter restating that all terms of the previous loan (interest rate, collateral, term) would be the same for the radio station loan; and (6) that the American River Bank would and always intended to make the loan to Ms. Marszal for the half-million dollars upon receipt of a completed loan application (Tr. 1347-48). By a Motion for Summary Decision, filed July 30, 1991, Marszal seeks summary resolution of the financial issue in her favor.

13. Susan Marszal is an individual applicant. She proposes to serve as general manager of the proposed station on a full-time basis (minimum of 40 hours per week). Ms. Marszal will have ultimate decision-making authority over all station operations, including programming and sales, and will solely control the financial affairs of the station and make all hiring and firing decisions.

14. She presently works approximately ten hours per week for California Retail Management on a per project basis, generally in the financial and pension area. She will continue to spend approximately ten hours per week working for California Retail Management if she is awarded the construction permit in this proceeding. Marszal Ex. 2.

15. Ms. Marszal has lived within the 1 mV/m service area of the proposed station in Carmichael, a community contiguous with Sacramento, since 1982. Marszal Ex. 2.

16. In the event her application is granted, Marszal will install auxiliary power generating equipment to ensure the station's ability to continue operation in the event of power outages. Marszal Ex. 3.

Media West Broadcast Group, Inc.

17. Media West is a California corporation in which voting shareholders Frank Adams and Frederick Quist each holds 50% of the voting stock. Each also holds one-third of the equity in the corporation; the remaining one-third equity is held by non-voting shareholder Mr. Anton Saca. Mr. Adams is president, treasurer and a director of the corporation. Mr. Quist is a director, vice-president and secretary.

18. Mr. Adams will be the general manger of the proposed station with an overall responsibility for station operations. Mr. Quist will be the general sales manager with overall authority for time sales, commercial content, and conformity of the stations' operations to the Commission's Rules. He will supervise the sales staff and will have authority to hire and fire. Each of the integrated principals will devote a minimum of 40 hours per week to their respective positions. Media West Ex. 3.

19. Mr. Quist is a life-long resident of the service area and currently resides in Gold River, California, within the 60 dbu coverage contour of the proposed station. Should Media West be awarded the construction permit, he will establish a permanent residence in Sacramento. Mr. Adams lived for one year in Citrus Heights, within the 60 dbu contour of the proposed station. Thereafter, and since 1974, Mr. Adams has lived in Orangeville, California, a community partially encompassed by the 60 dbu contour of the proposed station, although his actual residence is located about 2 miles beyond the referenced contour. Should Media West be awarded a construction permit, he will establish a permanent residence in Sacramento. Media West Ex. 3.

20. Mr. Adams spends a minimum of 26.5 hours per month on civic activities, most of them devoted to the blind and the developmentally disabled. From 1974 to the present, Mr. Adams has been a member of the Embarcadero Lion's Club. He served as president, secretary and as chairman on a variety of public service projects in Sacramento. From 1974 to 1978 and from 1978 to the present, Mr. Adams has been a member of the Friends Interested in the Severely Handicapped. From 1980 until the present, he has been active as a field supervisor with the Special Olympics' softball program. From 1978 to the present, Mr. Adams has worked with the Special Olympics as a volunteer serving on food lines and on tee shirt sales.

21. From March 1987 to the present, Mr. Quist has been a member of the Embarcadero Lion's Club. He is currently the second vice-president, the incoming first vice-president, and the co-chairman of Embarcadero Night. From April 1988 until the present, Mr. Quist has been active with the Galena Street East Productions. This is a local non-profit talent organization, and Mr. Quist assists in public relations and works as a stage technician for two shows each year. From March 1986 until July 1988, Mr. Quist was a coach and an assistant coach with the Land Park Little League. From August 1986 until November 1988, Mr. Quist served as an assistant coach with the Greenhaven Soccer League.

22. Mr. Quist has worked continously in radio broadcasting on a full-time basis since June 1977. Since October of 1982, he has served in managerial capacities with such companies as McClatchey Broadcasting, the Tribune Company, and Fuller-Jeffrey Broadcasting. Media West Ex. 3. The entirety of his experience has been in sales.

23. Mr. Adams worked as Co-op Marketing Director of KHYO Radio from April 18, 1989 to May of 1990. His experience in television broadcasting stems from his production of commercials for broadcast when he was general manager of Lombard Electronics from June 1969 to June 1979. Media West Ex. 3. There, he developed an in-house advertising agency at which he produced six to twenty television commercials per month for placement on television stations. He personally wrote the commercials, produced them, selected the talent to be used and directed the commercials. Tr. 1244, 1245. Approximately 35% of Mr. Adams' time during his tenure at Lombard Electronics was devoted to these television commercial activities. Tr. 1244.

24. Media West has proposed installation of auxiliary power units to keep the proposed station in operation during periods of commercial power outage. Media West Ex. 5.

Old Town Broadcasting Corporation

25. Old Town Broadcasting Corporation is a Delaware corporation with voting and non-voting common stock. Wilbur Johnson and Brenda L. Johnson, husband and wife, jointly own all of Old Town's voting shares (980 shares) which represent 34.15% of the corporation's equity. Tr. 166. Wilbur Johnson is president, treasurer and director of Old Town. Brenda L. Johnson is vice-president, secretary, and director. Old Town Exhibit 1.

26. Originally, Old Town had the following non-voting shareholders: Hugh Silvest, Dan K. Denton, Ron Bruder and Jeff J. Ornelius. Mr. Bruder subsequently left the corporation for personal reasons. Tr. 159.

27. Mr. Johnson contacted the Security Pacific National bank regarding a bank letter to cover contruction and operation costs. Tr. 161, 278. The bank required that the non-voting shareholders be personally liable for the debts of the corporation. Tr. 161-164, 176-177.

28. Approximately ninety days before filing the application, Mr. Johnson prepared a business plan for Old Town which was provided to the bank from which Old Town obtained its loan commitment. Tr. 272-273. Although page 6 of this business plan refers to Mr. Denton, Mr. Bruder, and Mr. Silvest as "equity investors," all three are listed under "Management" on page 3 of the plan and the plan discusses their combined broadcast experience. Media West Ex. 6. In addition, all of their resumes, at the request of the bank, are included in the business plan. Tr. 273. These resumes, also at the request of the bank, specifically describe the broadcast experience of the non-voting shareholders. Tr. 272.

29. It was Mr. Johnson who chose the role of business manager for his wife, Mrs. Johnson, in Old Town. Tr. 266. There is no evidence on the record that Mrs. Johnson had any significant involvement in the formation of the corporation or in the preparation and prosecution of Old Town's application. Mrs. Johnson read the corporate by-laws sometime after the application was filed. Tr. 311. She has taken no action as secretary of Old Town.

30. Wilbur Johnson proposes to work on a full-time basis, at least 40 hours per week, as the station's general manager. Old Town Ex. 2. He will develop station policy and oversee the performance of the station. He will work closely with his wife who will act as the business manager; the station will be operated as a family business. Mr.

Johnson anticipates that he and his wife will function as co-managers and that there will be no real demarcation between their duties and responsibilities. Tr. 195.

31. Brenda Johnson proposes to work at least 40 hours per week at the station as its business manager. Old Town Ex. 3. Her duties will include preparing expense projections, maintaining operating budget and expense accounts, managing receivables and payables, collecting delinquent accounts, and preparing all necessary financial reports. She plans to work closely with her husband and anticipates no real demarcation in their duties. Old Town exhibit 3 at 1-2.

32. Mr. and Mrs. Johnson currently own and run a mobile music business. Tr. 326. Mrs. Johnson testified that they will not continue to run that business if Old Town is awarded the contruction permit; Mr. Johnson testified that the running of the business will be turned over to their son. Tr. 303-304.

33. Mr. and Mrs. Johnson are both Black. Old Town Ex. 2. They reside in Richmond, California.

34. Mr. Johnson is currently an on-air announcer at KFRC (AM), San Francisco, California, and was formerly the program manager at KFRC (FM) from 1974 - 1975. He was employed at WJPC in Chicago from May 1971 to May 1974. From July 1969 to May 1971, he was based at KWK in St. Louis, Missouri, where he was promoted from air-personality to production manager, to program director, to operations manager. Mr. Johnson has also worked as an air personality and as a music director at KYUM in Yuma, Arizona, from June - September 1968. He was also employed as operations manager for KEGM from January to June 1968. From April-December 1987, Mr. Johnson was a part-time air-personality for KASM in Sacramento. Finally, Mr. Johnson hosted a nationally syndicated radio program from 1972 to 1974 on a part-time basis. Old Town Ex. 2. Mr. Johnson proposes to resign from his position at KFRC upon grant of Old Town's application.

35. Old Town will install emergency power generators at the studio and transmitter sites to ensure that the station will remain on the air in the event of a public utility power failure. Old Town Ex. 1.

Rio Americano Communications Corp.

36. Rio Americano is a Delaware corporation and its sole shareholder is Mr. Richard Ibarra. The Certificate of Incorporation grants the corporation the authority to issue voting common stock and non-voting common stock (JAM Exhibit 8; Tr. 561). As of this date, the corporation has not issued any non-voting common stock. Tr. 562.

37. Rio Americano has an agreement providing for the issuance of debentures (convertible into non-voting capital stock) in the amount of $60,000.00 to a San Diego company called Communications Venture Capital Group, Inc. (CVCG). CVCG agreed to loan up to $60,000 to Mr. Ibarra. (Rio Ex. 1).

38. Mr. Ibarra learned about the availability of the Sacramento channel from a friend, Mr. David Garcia. Garcia, who apparently has some connection with (CVCG), recommended that Ibarra contact Mr. Zevnik to serve as communications counsel and to inquire about CVCG as a possible source of funding. Tr. 563. Thereafter, Mr. Ibarra contacted Mr. Zevnik, who in turn contacted CVCG on behalf of Mr. Ibarra. Tr. 567. Mr. Garcia had told Mr. Ibarra that Mr. Zevnik might be used as an intermediary with respect to arranging financing for the station. Tr. 597.

39. The only direct contact Ibarra has had with CVCG was through a CVCG shareholder named Walter Ulloa, whom he calls upon when he needs money. Tr. 570-573. He has never met Ulloa, or bargained with him.

40. Mr. Zevnik recommended Rio Americano's engineer. Tr. 581. Mr. Garcia suggested the transmitter site, and then Mr. Ibarra made the arrangements with the general operations manager of Johnson Communications, the site owner. Tr. 582.

41. Mr. Ibarra testified that he reviewed a projection of what the costs would be, including salary, construction, the lease of the transmitter site, the lease of the studios, and the engineering costs; based on that estimate, he obtained a financial commitment letter from a bank. Tr. 585. Mr. Ibarra did not consult with CVCG about what bank to approach to get a loan commitment letter. Tr. 585, 616.

42. To fund prosecution of the application, Mr. Ibarra draws down funds under the debenture by calling Mr. Ulloa to tell him the amount of money that Ibarra needs. Tr. 573, 614. Mr. Ulloa does not receive copies of the bills that need to be paid, nor has he ever asked for those bills. Tr. 573. Mr. Ulloa has never denied an additional request for funds from Mr. Ibarra under this arrangement. Tr. 573.

43. Mr. Ibarra is a Hispanic male and will be the general manager of the proposed station. Rio Americano Ex. 1. He will supervise day-to-day operations. He will work full-time, a minimum of 40 hours per week, and will hold no outside employment.

44. Mr. Ibarra lived in the city of Sacramento from 1948 to 1978. He attended St. Pious X School from September 1961 to June 1964, in Galt, California, as a boarding student. Tr. 588. Mr. Ibarra was on active duty with the U.S. Navy from January 1966 thru October 1969. From 1978 until the present, Mr. Ibarra has lived outside the service area of the proposed station, but will live in Sacramento if Rio Americano is awarded the construction permit.

45. Mr. Ibarra attended and participated in the meetings of the Sacramento Chicano News Media over a six month period in 1983, and was a fundraiser in 1988. Tr. 619, 620, 623. He also gave volunteer aid for a TV Channel 6 public television auction in 1974 and 1976, and participated in the 1985 fundraiser for the Make a Wish Foundation, which helps terminally ill children. Tr. 624-626. Also, he has helped to publicize Su Salud since 1989. This is an organization of health professionals, of which he is not a member. Tr. 627-630.

46. Mr. Ibarra worked for KXTV, Sacramento, California, as a cameraman-engineer from 1972-1977, and then as a reporter until 1978. He has since been a reporter for KOVR-TV (1978-1980), and KCRA-TV (1980 to the present), in the Stockton bureau of these stations. Rio Americano Ex. 1; Tr. 590.

47. Rio Americano proposes to have auxilliary power generators both at its studio and transmitter sites. Rio Americano Ex. 1.

One-O-Three Broadcasting Co., Inc.

48. One-O-Three is a California corporation authorized to issue voting and non-voting stock. JAM Ex. 7; Tr. 368.

49. There are two stockholders of One-O-Three: 1) Forrest P. Maurer, president, secretary/treasurer, director and owner of 80 shares of voting stock; and 2) Phillip A. Corriveau, vice president, director and owner of 20 shares of voting stock.

50. Mr. Corriveau presently works as general manager of non-commercial radio station KXPR (FM), Sacramento, California. KXPR (FM) is licensed to California State University/Sacramento. If the One-O-Three application is granted, Mr. Corriveau has committed to terminate his employment with California State/Sacramento. One-O-Three Ex. 4; Tr. 370.

51. Mr. Corriveau will serve as the general manager of the radio station and will work full-time, 40 hours per week, at the station. As the general manager, Mr. Corriveau will be responsible for overseeing all administrative, operational, programming, and technical functions of the station. He will also be responsilbe for the station's compliance with Federal Communications Commission rules, regulations and policies, as well as implementation of the station's Equal Employment Opportunity Program.

52. Mr. Corriveau received a B.A. degree in communications arts in 1973 from the University of Wisconsin. During his undergraduate years, he worked part-time as a technician and recording engineer at WHA Radio in Madison, Wisconsin. After receiving his B.A. degree, Mr. Corriveau worked full-time for the Wisconsin Education Communications Board as a producer/engineer for the Wisconsin Educational Radio Network, based in Madison, Wisconsin.

53. In 1977, Mr. Corriveau was appointed to an academic specialist position at WHA Radio. In this capacity, he was responsible for producing cultural and educational radio programs for WHA and the Wisconsin Educational Radio Network. During the mid 1970's to early 1980's, he was part owner of a media production company and worked part-time producing radio commercials and radio and television programs for broadcast locally, statewide and nationally.

54. In 1979, Mr. Corriveau was appointed to the position of program director at WHA Radio. There, he was responsible for supervising a staff of twenty full-time broadcast professionals, fifteen part-time employees, and managing the day-to-day operations of the WHA broadcast facility.

55. In 1980, Mr. Corriveau became the general manager of KXPR (FM), Sacramento, a radio station licensed to California State/Sacramento. Mr. Corriveau also served as a lecturer at California State University from 1970 to 1987. As a part-time associate professor, he taught evening courses in radio and television production and telecommunications management.

56. Mr. Corriveau has resided in the Sacramento area since June 1980, at all times within the service area. Tr. 373. His present residence, to which he moved in 1986 or 1987 before the filing of the application, is located within the city limits of Sacramento. Tr. 373.

57. Mr. Corriveau has served as Chair of the Marketing Committee of the Board of Directors of the Chamber Music Society of Sacramento since 1988. One-O-Three Ex. 2. He joined the organization after One-O-Three's application was filed (Tr. 388).

58. As an Honorary Commander of the 320th Bombardment Wing from 1989 to the present, he has worked to strengthen the relationship between the people of Mather Air Force base and the Sacramento community.

59. Mr. Corriveau served as president of California Public Radio, an association of public radio stations, in 1985-1986 and continues to serve on its board of directors and executive committee.

60. He has served on several national volunteer boards and committees, including National Public Radio task forces and advisory boards, such as the NPR Audience-Building task force (1986), the NPR Audiosat task force (approximately 1982), and a Corporation for Public Broadcasting grant panel (1986). From 1980 to 1985, he was an active member of the Sacramento Valley Broadcasters Association and served as chair of its Public Affairs Committee in 1982.

61. Forrest P. Maurer is the president, secretary, treasurer, director and 80% owner of One-O-Three Broadcasting. He is presently involved in real estate construction and development business as a small businessman. If One-O-Three is granted the construction permit, Mr. Maurer will leave his present business and work full-time, at least 40 hours per week, at the new station as its sales-finance manager. As such, he will be responsible for overseeing the station's sales effort, supervising the sales staff, developing budgets and overseeing efforts to meet budget goals.

62. Mr. Maurer has resided in the Sacramento area for 25 years, at all times within the service area of One-O-Three's proposed station. One-O-Three Ex. 3. For approximately 2 1/2 years beginning in 1965, Mr. Maurer resided within the Sacramento city limits. Tr. 405. In 1973, Mr. Maurer served as a member of the board of directors of St. Michael's Episcopal School. In that same year, he was a member of the Environmental Protection and Planning Review Committee, a committee appointed by the Sacramento county board of supervisors to study and recommend ways to improve county planning. In 1977, he was a member of the Voluntary Affirmative Fair Marketing Agreement, helping to create an agreement designed to eliminate housing discrimination in the Sacramento area. From 1981 to 1984, he was a member of the Sacramento County Project Planning Commission. In 1983, Mr. Maurer served as chairman of the Sacramento County Zoning Board of Appeals. From 1985 to 1987, Mr. Maurer served on the Sacramento County Policy Planning Commission. From 1975 to 1987 he was co-host of the Multiple Sclerosis Society Charity Honor Ball. In 1986, he was a member of the Sacramento Affordable Housing Conference, the purpose of which was to make the public aware of housing problems in the Sacramento area and the efforts being made to cope with the growing need for shelter. In 1987, Mr. Maurer served as co-chairman of the Anti-Defamation League Distinguished Community Service Award Ball, an event which honored Sacramento community leaders and raised monies for the furtherance of the work done by the Anti-Defamation League.

63. One-O-Three proposes the use of auxiliary power supplies at the studio and transmitter sites to supply electrical power in the event of a commercial power failure.

Olympic Broadcasters, Inc.

64. Olympic Broadcasters, is a Nevada corporation qualified to do business in California. Olympic Ex. 1. Mr. Douglas D. Kahle is its president and 50% shareholder; Mr. William E. Boeing, Jr., is Olympic's chairman of the board and is also a 50% shareholder. Its officer and directors are Pauline L. Kahle, Jamie Clark, and William Rademaker.

65. Olympic is the licensee of KFIA, Carmichael, California, KQNC (FM), Quincy, California, FM translators K257BW, Susanville, California, K265CF, Graeagle, California and K257BV, Portola, California.

66. William Boeing, Jr., owns 24.5% of Lobster Communications Corporation, licensee of KLIQ (FM), Shingle Springs, California. Douglas D. Kahle is vice-president/treasurer, director and 24.5% owner of Lobster Communications Corporation. Mr. Kahle is also president, director and one third owner of Radio 1500, Inc., licensee of WBRI (AM), Indianapolis, Indiana and WXIR (FM), Plainfield, Indiana.

67. Until June 1, 1990, Mr. Kahle was president, director and one-third owner of Radio 900, Inc., licensee of WFIA (AM) and WXLN (FM), Louisville, Kentucky. Mr. Kahle is prsently vice-president, director and one-third owner of Radio 780, Inc., licensee of WABS (AM), Arlington, Virginia.

68. Pauline Kahle is director and assistant vice president of Radio 1500, Inc. and Radio 780, and, until June 1, 1990, was a director and assistant vice-president of Radio 900, Inc.

69. Jamie Clark serves as general manager of stations KFIA, KLIQ (FM), and KQNC (FM).

70. No owner of Olympic will be integrated into the management and operation of the proposed Sacramento station. Also, Olympic does not propose to utilize auxiliary generating equipment.

Fahlda Broadcasting Company

71. The owners of Fahlda Broadcasting Company, A California Limited Partnership ("Fahlda") are:

Name	Position	Equity Holding
Fahlda Nelson	Sole General Partner	35%
A.H.A.B. Family Trust, Guyon Turner, Trustee,	Sole Limited Partner	65%

Fahlda Ex. 1.

Ms. Nelson initiated the Fahlda application. Tr. 1044. She brought in Mediacomm National Inc., a company 100% owned by Ragan A. Henry, as sole limited partner. Tr. 1048-49. Ms. Nelson and Mr. Henry negotiated an arrangement whereby Ms. Nelson would have 35% of the equity and Mediacomm would have 65% of the equity. Tr. 1057. Ms. Nelson has invested $9,000 of her own money in Fahlda's application. Tr. 1072.

72. Mr. Henry provides some of Fahlda's prosecution expenses through the A.H.A.B. Family Trust, which succeeded Mediacomm as limited partner. Tr. 1052, 1208. He will provide funds to construct and operate the station. Tr. 1052, 1067-68.

73. Mr. Nelson will work at the station as general manager on a full-time basis (at least 40 hours per week). In that position, Ms. Nelson will ultimately be responsible for all management, administrative, budgetary, and programming decisions relating to the operation of the station. Fahlda Ex. 3. She intends to operate the station indefinitely. Tr. 1041.

74. Ms. Nelson is employed parttime as a Training Officer for the California Unemployment Insurance Appeals Board. In the event Fahlda is awarded the contruction permit, Ms. Nelson will resign her position with the Appeals Board in order to work fulltime at the proposed station. Fahlda Ex. 3.

75. At the time of the hearing, Ms. Nelson had been a resident of Sacramento since September, 1979. In August, 1990, Ms. Nelson moved to Elk Grove, a suburb of Sacramento located five miles south of the city. Ms. Nelson's new residence is located within the 60 dbu contour of the proposed station. Owing to the proximity of Elk Grove to Sacramento, Ms. Nelson does not plan to relocate to Sacramento should the application be granted. She is presently commuting to Sacramento to work. Fahlda Ex. 3.

76. Ms. Nelson is a black American citizen. Fahlda Ex. 3 at 2.

77. Ms. Nelson has been involved in a variety of community, civic and charitable organizations serving Sacramento, including the following:

12/85 - Present National Black Media Coalition Sacramento Coordinator. Ms. Nelson has devoted an average of 20 hours per month to NBMC since becoming a member. Fahlda Ex. 3 at 2.

1/87 - Sacramento Urban League. As a member, Ms. Nelson devoted an average of five hours a month to the League. Fahlda Ex. 3 at 3.

2/87 - 12/88 Affirmative Action Committee, County of Sacramento. As a member, Ms. Nelson devoted an average of 10 hours a month to the Committee. Fahlda Ex. 3 at 3.

5/87 - Present Sacramento Chapter, National Organization for Women. Ms. Nelson keeps apprised of women's issues and attends NOW fundraisers, devoting an average of one hour monthly to NOW. Fahlda Ex. 3 at 3.

7/87 - Sacramento Branch of the NAACP. Member. Since becoming a member, Ms. Nelson has devoted an average of one hour per month to the NAACP. Fahlda Ex. 3 at 3.

1/88 - Present South Sacramento Community Planning and Advisory Council. Ms. Nelson has devoted an averge of three hours per week to the Council since becoming a member. Fahlda Ex. 3 at 3; Tr. 1029.

5/88 - Present Del Paso Heights Redevolpment Advisory Committee. Member since 5/88; elected Chairperson in 10/89 she has devoted an average of 15-20 hours per week to the Committee. Fahlda Ex. 3 at 3; Tr. 1029.

2/90 - Present Meadowview Community Action Coaliition. Secretary. Ms. Nelson devotes an average of five hours per week to the Coalition. Fahlda Ex. 3 at 4.

Ms. Nelson's broadcast experience is as follows:

9/76 - 5/79 San Francisco State University. Earned B.A. in Broadcasting Communication Arts. Also attended San Diego State University, 9/75 - 5/76, majoring in Telecommunications. Fahlda Ex. 3 at 4.

9/77 - 9/78 Television Center, San Francisco State University. Audio Technician. Ms. Nelson operated an audio board, wrote and produced PSAs and handled other production work.

9/78 - 5/79 Television Center, San Francisco State University. Ms. Nelson implemented viewership sample surveys, maintained and updated statistical records and submitted written reports. Fahlda Ex. 3 at 4.

9/78 - 5/79 Third World Video Communications, San Francisco. Assistant Director. Worked with community based organizations to plan and videotape their workshops and events in the San Francisco Bay area. Operated various types of video equipment. Various projects were compensated; about half of the time spent with Third World Video was as a volunteer. Fahlda Ex. 3 at 4.

9/80 - 9/82 Columbia School of Broadcasting, Sacramento. Earned Announcing Degree. Fahlda Ex. 3 at 4.

12/88 - Present Sacramento Community Cable Foundation. Produces and Hosts "Jazz with Fahlda", airing for two hours weekly. Operates audio equipment, writes and announces public service announcements.

78. Fahlda proposes to install auxiliary generators at the studio and transmitter sites in order to supply power in the event of a power failure. Fahlda Ex. 4.

Old Sacramento Broadcasting Co., Inc.

79. Old Sacramento is a California corporation, with its voting stock owned by Mario Obledo (2,400 shares) and Stella Guzman (1,600 shares). Mr. Obledo is the applicant's president, treasurer, and is a director. Ms. Guzman is the applicant's vice-president, secretary, and she is a director. Old Sacramento's non-voting shareholders are James A. Hernandez (2,000 shares), Mateo Camarillo (2,000 shares), and Amador Bustos (2,000 shares).

80. At a meeting attended by Messrs. Hernandez, Camarillo, Obledo, Bustos, and a Mr. Jose Reynoso, a corporate form for the applicant was agreed upon. It was understood that Camarillo, Hernandez, and Bustos would hold the non-voting stock and that Obledo, and one other person whom he would choose, would hold the voting stock. Tr. 664-665. It was decided that Obledo would have the majority of voting stock and the ownership percentages were worked out at that time, prior to the time that Stella Guzman became involved. Tr. 666.

81. At this meeting, Camarillo recommended as communications counsel Mr. Ernest Sanchez. Mr. Bustos recommended Oscar Cuellar of Denver, Colorado, as an engineering firm. Tr. 667-668. It was agreed at the meeting that all shareholders would share *pro rata* in the prosecution and construction costs of the proposed station. Tr. 676. A handwritten draft application prepared by Mr. Hernandez was circulated at the time. Tr. 700. A Model EEO program, for an applicant called "Es Possible Minority Media Telecommunications, Inc.", was provided by Mr. Camarillo at that time. Camarillo was principal of an applicant with that name for another FM facility. Tr.701.

82. Old Sacramento, in fact, hired Sanchez and Cuellar, as recommended by its non-voting shareholders. Tr. 667-668. Some days before the application was filed, Obledo met with Guzman to discuss her participation in the applicant. Tr. 697. She agreed at that time to join in the application. Tr. 697-698. Mr. Bustos initially obtained permission to specify the transmitter site in the original application of Old Sacramento. Tr. 709.

83. During the summer of 1989, after the application had been filed, Camarillo sent a handwritten note to Obledo which included and referenced a decision by the FCC in a comparative broadcast proceeding. One-O-Three Ex. 11, Tr. 712. The note suggested that it might be helpful to ask each of the principals of Old Sacramento to recall in writing a number of factors concerning the organization of the applicant. The note also states, regarding the FCC decision which was attached, "it is instructive to read especially 35-38. Ernie Sanchez was their initial lawyer when several significant costly errors were made - led Judge to call application a sham." One-O-Three Ex. 11.

84. Mr. Camarillo also wrote Obledo on February 11, 1989, offering strategy for the prosecution of the application. One-O-Three Ex. 12, Tr. 810- 811. Following receipt of the letter, Obledo discussed strategy matters with Camarillo by telephone. Tr. 812. The letter from Camarillo to Obledo stated Camarillo's disagreement with legal advice provided by Sanchez and recommended ways of saving money and possible settlement arrangements. Old Sacramento terminated its relationship with Mr. Sanchez in July of 1989.

85. Mr. Obledo, who owns 60% of Old Sacramento voting stock, will be the station's full-time general manager. OSB Ex. 3. Mr. Obledo intends to withdraw from all of his active business pursuits to devote at least 40 hours per week to the proposed station. *Id.* In order to effectuate his integration pledge, he will reduce his civic and political activities to no more than 15 hours per week.

86. Mr. Obledo has two business addresses outside of Sacramento, namely, Washington, D.C. and Austin, Texas. Tr. 696. For the last five to six years he has spent about 10% of his time at each business.

87. Ms. Guzman, who owns 40% of the voting stock, will be the full-time station manager. OSB Ex. 4. Ms. Guzman will withdraw from her employment at station KCSO-TV and all of her active business pursuits to devote a minimum of 40 hours per week to the proposed station.

88. Both Mr. Obledo and Ms. Guzman are Hispanic. OSB Ex. 3; Ex. 4. Ms. Guzman is also a female. (OSB Ex. 4, p. 1).

89. Mr. Obledo has been a resident of Sacramento for three and one-half years. OSB Ex. 3; Tr. 694. Prior to that, he resided outside of the city limits for six years. Tr. 694. Before that, Mr. Obledo resided within the city limits of Sacramento. Tr. 695.

90. Ms. Guzman resides in Roseville, California. OSB Ex. 4. Her residence is outside the one millivolt contour of the proposed station. Tr. 986.

91. Mr. Obledo is the former Secretary of Health and Welfare of the State of California and a former gubernatorial candidate. OSB Ex. 3.

92. He is the former national president of LULAC, a member of the Board of the LULAC Foundation, and has been a member of the Sacramento chapter since 1975. OSB Ex. 3.

93. Mr. Obledo has been a member of the Sacramento chapter of the Nicaragua Network since 1985. OSB Ex. 3. He belongs to the Sacramento chapter of the Mexican American Political Association. OSB Ex. 3. Mr. Obledo has been a member of the Sacramento chapter of the National Rainbow Coalition, Inc. since 1987. OSB Ex. 3.

94. Ms. Guzman is a member of the Sacramento Hispanic Chamber of Commerce. OSB Ex. 4. In 1982, she participated in an Hispanic Youth Leadership Conference in Sacramento OSB Ex. 4.

95. In 1985 and 1986, she was a member of the Board of the Washington Neighborhood Center. OSB Ex. 4. In 1976 and 1977 she was a member of the Cirby Elementary School Title VII Parent Advisory Board.

96. From 1981 to 1985, Ms. Guzman was employed as an account executive at KRCS, Roseville, a station within the Sacramento ADI. From 1985 to the present, she has been employed as an account executive at KCSO-TV. OSB Ex. 4.

97. Old Sacramento has no other media interests. OSB Ex. 2. Mr. Obledo has no media interests or media connections. OSB Ex. 2. Ms. Guzman has no media interests, although she is employed full-time as an account executive at KCSO-TV, Sacramento. OSB Ex. 2. Upon a final grant of Old Sacramento's application, Ms. Guzman will sever all connections with KCSO-TV.

Non-voting shareholder Amador Bustos has the following media interests:

1) Amador S. Bustos and his wife, Rosalie L. Bustos, together own 100% of Toro Broadcasting General Partnership. Toro is a 31.57% stockholder in Coyote Communications, Inc., which holds the construction permit for station KRAC-FM, Channel 241A, Morgan Hill, CA. Mr. Bustos is president of Coyote.

2) Mr. Bustos is a limited partner with a 33-1/3 equity interest in BCD Limited Partnership, an applicant for Channel 230A, Modesto, CA. The proceeding has been designated for hearing (File No. 880301OS).

3) Mr. Bustos and his wife are applicants for Channel 295A, Los Banos, CA. The application is awaiting hearing designation before the FCC (File No. 890503ME).

4) Mr. Bustos filed an application on February 28, 1990, as an individual, for a construction permit for Channel 282C1, to supplant radio station KQKS, Longmont, CO (File No. 900229MB).

5) Amador S. Bustos has been the General Sales Manager for both KBRG-FM, Fremond, CA, and KLOK-AM, San Jose, CA, since August, 1988.

OSB Ex. 2.

Non-voting shareholder Mateo Camarillo has the following media interests:

1) He is a 30-percent shareholder, president, and chairman of the board of Quetzal Bilingual Communications, Inc., which holds a construction permit for a new AM station at San Diego, CA (BP-81070AE).

2) He is a non-voting shareholder in Es Posible Minority Media Telecommunications, Inc., an applicant for a new TV station at Avalon, CA (File No. BPCT-862010KH).

3) He is a non-voting shareholder in G&C Minority Media Telecommunications, Inc., an applicant for a new FM Broadcast station at Kerrville, TX (BPH-85071209).

OSB Ex. 2.

98. Old Sacramento will install emergency power generators at both its transmitter site and its studio location for use in the event of power failure. OSB Ex. 5.

JAM FM Limited Partnership

99. JAM is a limited partnership organized under the laws of the state of California. JAM Ex. 1. Nathaniel S. Colley, Jr., is the sole general partner and owns 20% of the total partnership interest in JAM. Mr. Colley presently resides in Sacramento and is also a life-long resident of that city. JAM Ex. 3.

100. B. Scott Reardon III, is the sole limited partner of Jam. Mr. Reardon owns 80% of the total partnership interest.

101. In the summer of 1987, Mr. Reardon telephoned Mr. Colley and informed him that there was soon to be a new FM station in Sacramento Tr. 864. Reardon told Colley that he was interested in forming a group to file an application and desired to know if Mr. Colley was interested in participating. Tr. 864, 865. Mr. Colley indicated that he was interested, so the two of them agreed to meet. Tr. 865.

102. Reardon suggested the formation of a limited partnership to file an application. Sometime thereafter, Mr. Colley received a draft of the agreement. Fung Ex. 2. Mr. Colley inserted a certain provision into the agreement to

ensure that he can call upon the limited partner to make additional capital contributions if needed. Tr. 914-16. The typed final version, JAM Ex. 5, was then sent to Mr. Reardon for his signature, and ultimately filed with the State of California. Tr. 873.

103. Mr. Colley hired communications counsel, Besozzi & Gavin, for JAM. JAM Ex. 3. He had no previous contact with Besozzi & Gavin prior to meeting with Mr. Reardon. Tr. 875. He learned about the firm either in his first or second meeting with Mr. Reardon. Tr. 875.

104. Prior to the filing of the application, Mr. Colley met with Joan Mercer, a representative of the Wong Center, the owner of JAM's proposed transmitter site. JAM Ex. 3; Tr. 879. He spoke to Ms. Mercer about reaching an agreement to place JAM's antenna atop the Wong Center. Tr. 879-80. Mr. Colley had also explored using land owned by his parents in Oak Grove, California, which would eliminate any need to rent property, but learned that this property was not suitable for the transmitter site. Tr. 906-07.

105. JAM's counsel prepared the application Form 301, with Mr. Colley providing the information for this purpose. Tr. 884. Mr. Colley personally authored Jam's Program Service Statement, FCC Form 301, Ex. 1, and obtained the necessary information for JAM's Equal Employment Opportunity Program. JAM Ex. 3.

106. Mr. Colley hired JAM's certified public accountant and established a partnership bank account from which he pays the expenses of prosecuting the application. JAM Ex. 3. He also established and maintains JAM's public inspection file.

107. Neither JAM nor its general partner, Mr. Colley, owns any interest in any medium of mass communications. JAM Ex. 2. Similarly, Mr. Reardon has no ownership interest in any such medium of mass communications. Jam Ex. 2. When JAM filed its application on November 10, 1987, Mr. Reardon had a 50% ownership interest in Sedgwick Broadcasting Co., licensee of FM station KXLK, Hayesville, Kansas. JAM Ex. 2. Mr. Reardon consummated the sale of his interest in Sedgwick in November 1988.

108. Mr. Colley will be integrated full-time, a minimum of forty hours per week, into the management of JAM's station as the general manager. JAM Ex. 3. Mr. Reardon will not be involved in the management of the station.

109. As the general manager, Mr. Colley will oversee and be ultimately responsible for all aspects of station operations. All station department heads will report to him. Mr. Colley will make the ultimate decisions about programming and personnel. He will also be responsible for the establishment and implementation of JAM's Equal Employment Opportunity Program.

110. If JAM's application is granted, Mr. Colley will terminate any employment in which he has been involved to devote his full-time to the management of the station. Mr. Colley is currently enrolled at the University of California, Davis, as a doctoral candidate in the University's Department of Anthropology. JAM Ex. 3. However, Mr. Colley has committed to suspend those studies if JAM's application is granted. JAM Ex. 3; Tr. 954-55. He is presently on leave from his doctoral program. Mr. Colley, a lawyer, works at his father's law office during summers when he has been out of school. Tr. 893. After completing his law studies, Mr. Colley became a partner in the Sacramento law firm of Colley, Lindsey & Colley. Although no longer a member of the firm, Mr. Colley continues to perform legal work on a part-time basis. Mr. Colley will terminate that work upon grant of the JAM application.

111. Mr. Colley is the author of a Bible Study of the Gospel of John and the Epistle of Paul to the Colossians. Since 1988, he has been the Associate Minister of the New Testament Baptist Church, North Highlands, California. From 1983 until 1985, he was the Associate Minister, St. Paul's Baptist Church, Sacramento.

112. Mr. Colley, a black citizen, is a life-long resident of the City of Sacramento. He was born in Sacramento on June 8, 1956. Mr. Colley attended the University of Michigan, in Ann Arbor, Michigan, from which he received a B.A. degree in 1977 and a J.D. degree in 1979. Mr. Colley's permanent residence during this time was in Sacramento, California. Mr. Colley remained a registered voter in California and voted in California elections. He returned to California on a full-time basis in 1979.

113. Mr. Colley represented his high school at the California Boys State in 1973. He also served as a member of the Commission on the Reform of Intermediate and Secondary Education in 1974, following appointment to the Commission by the California State Superintendent of Public Instruction.

114. Mr. Colley is a Life Member of the National Association for the Advancement of Colored People ("NAACP"). He was elected to the National Board of Directors of the NAACP in 1973 at the age of 16. He served on the Board until 1976.

115. In 1981, Mr. Colley was elected president of the Sacramento branch of the NAACP. His term continued until 1982.

116. In 1980, Mr. Colley served as a member of the Sacramento County Revenue Sharing Advisory Board. In 1982, he served a term on the Sutter Community Hospital's Commission on Program Planning. This was an advisory panel of leading citizens who helped a rapidly growing private hospital chain better serve the Sacramento community.

117. In 1982, Mr. Colley served a term on the board of directors of the Sacramento United Way. From 1983 until 1984, Mr. Colley belonged to the board of directors of the Computer Alternative Center for Independent Study. The Center helps train Sacramento-area minority Americans in computer skills.

118. From 1983 until 1984, Mr. Colley was a member of the board of directors of the Sacramento Make-A-Wish Foundation. The Foundation is a group organized to fulfill the last wishes of terminally ill children.

119. Since 1986, Mr. Colley has served on the advisory board of the Sacramento Opera Association. Mr. Colley has been a member of the Sacramento Black Chamber of Commerce since 1989.

120. Mr. Colley is currently on the Black Family Week Planning Committee for the University of California, Davis. He has been a member since September 1989.

121. Mr. Colley was a member of the board of directors of Legal Services of Northern California, representing Sacramento, from January 1987 until January 1990.

122. Mr. Colley serves currently on the Executive Board of Directors of the Internal and International Cultural and Education Exchange. He also coaches the Angels girls softball team in the Willow Ranch (Sacramento) Little League. Tr. 900.

123. Mr. Colley worked at radio station WCBN-FM, Ann Arbor, Michigan. WCBN is licensed to the Regents of the University of Michigan and operates on 88.3 mhz at an effective radiated power of 200 watts. Mr. Colley was a disc jockey (1974-1975); assistant music director (1975-1976); talk show host (1976-1977); program director (1977-1978); general manager (1978-1979); and member, board of directors (1979). JAM Ex. 3; Tr. 943-45.

124. In 1983 Mr. Colley hosted a program, "Thus Saith the Lord," on radio station KFIA, Sacramento, California. From 1984 until 1985, Mr. Colley worked on the staff of the public affairs program "Marin Talks Back."

125. JAM will install auxiliary power facilities at both JAM's studio and transmitter locations. JAM Ex. 4.

Jack L. Powell

126. Jack L. Powell is an individual applicant. He owns KJAY(AM), a daytime-only station licensed to Sacramento. Mr. Powell has personally and continously managed KJAY(AM) on a full-time basis since December 1965. Powell Ex. 2. If successful in this proceeding, Mr. Powell will divest himself of KJAY(AM) within three years of the commencement of program tests on the FM station, within the period contemplated by the Commission's "daytimer preference" policies. Powell Ex. 1.

127. If Powell's application is granted, he will work at the station on a full-time basis (at least 40 hours per week) as its general manager. He will supervise all day-to-day operations of the station including the setting of personnel policies, the establishment of programming, financial planning, sales and promotion, and general administration. Pending divestiture of KJAY(AM), the operation of that station will be increasingly turned over to the station's current assistant general manager who has worked at the station with Mr. Powell for ten years. Powell and the assistant general manager are the only workers at the AM station. Tr. 1299-1300. The studios and offices of both the AM and FM stations will be in the same building, and most general administration functions will be common to both stations. Powell is prepared to put in a lengthy work week at those times when his personal attention may be needed at KJAY(AM) in order to avoid conflict with his full-time commitment to the FM station.

128. Powell was born in Mitchell, Nebraska, and graduated from Denver (Colorado) University in September 1944. While there, he studied some broadcasting and also took classes in broadcasting and also worked as an announcer on a regular basis for KFEL, Denver, until graduation, and thereafter to 1946. In 1947, Powell joined Station KYOR, San Diego, California, as an announcer, changed to KVVC, Ventura County, in 1948, and moved to KVEN, Ventura, in April, 1949. At KVEN, he worked both as an announcer and in sales. In 1951, he acquired a 20 percent interest in the licensee of KVEN, became a director and was made sales manager. In September 1953, he left to become General Manager of KXOC, Chico, California, continuing in that capacity until 1955. He continued to hold his 20% interest in KVEN until 1955, when he sold it and bought Station KVON, Napa, California and moved to Napa. Powell personally managed that facility, on a full-time basis, until it was sold in September 1963. During this period, he also obtained a permit for Station KMSL, Ukiah, California (1959), put it on the air, and operated it until it was sold in 1961.

129. Powell has resided continously in Sacramento since December 1965. He has lived mostly at his present address since July 1966.

130. Powell received the highest Civilian Award from the U.S. Army for his activity on behalf of its Depot (1968-1971). He donated programming time on KJAY to Army programs, and acted as an announcer at some of these functions.

131. He has been a member of the West Sacramento Chamber of Commerce since 1971, was on itd Board of Directors (1979-1981), served as its "Parade Announcer" for its Columbus Day Event (1969-1976) and announced other functions of the Chamber. He has been a member of the Sacramento Safety Council since 1978, was on its Board (1983-1984) and has been a trustee ever since. The Council is concerned with on the job safety, and the safety of children at school, in the home and on the road.

132. Powell was a director of the Rotary Club (1987-1988) and, beginning in July, will be Chairman of the Conference and Convention Committee, as well as its Public Relations Committee. He has served on the Conference Convention Committee continously since 1976, and has been a member of the Public Relations Committee since 1986.

133. Over the years, Powell has assisted the Red Cross, the Boy Scouts and many other local organizations in publicizing their fund-raising drives and other events. He regularly speaks to service clubs such as Lions, Rotary and Soroptomists, as well as to churches.

134. The Comstock Club (1200 members) brings national and international speakers to Sacramento who address a wide range of public concerns. KJAY has aired these events at no cost for more than 15 years. Powell has personally attended and recorded each of these sessions, and has also done announcing at some of these events.

135. Through KJAY, Powell provides free programs directed to the needs of senior citizens, such as Medicare inofrmation, protection and adult health. Through KJAY(AM) Powell has provided free publicity services for the Seventh Day Adventists Church, Sacramento County Health Department, San Juan United School District, Consumnes River College, California Association of Health Facilities, Sacramento Chamber of Commerce, U.S. Navy Recruiting Service (1967), U.S. Air Force (Annual), Saint Patrick's Day Mummers (since 1966), Fort Sutter and East Yolo Lions Clubs (1979), California National Guard and the American Law Enforcement Officers Associations.

136. Powell will maintain auxiliary facilities so as to assure that the station will be operated in the event of a power failure. Powell Ex. 1.

Sacramento FM Broadcasters Limited Partnership

137. Sacramento FM Broadcasters Ltd. Partnership ("FMBLP") is a limited partnership organized under the laws of the State of California. FMBLP Ex. 1; Attachment A. FMBLP is comprised of two general partners and one limited partner. Bella L. Meese is a 35% general partner and holds 20% of the equity of the partnership. Private Network, Inc. ("PNI") is a 65% general partner and holds

40% of the equity of the partnership. Broadcast Data Corp. ("BDC") is the limited partner and holds a 40% equity interest in the partnership.

The principals of PNI are as follows:

Billy J. Parrott
President, Director
and 42.3% stockholder

William Walker
Vice President, Secretary/Treasurer,
Director and 42.3% stockholder

James H. Gray
9.4% stockholder

Robert H. Parrott
5.0% stockholder

Charles V. Richardson
1.0% stockholder

138. The applicant was formed pursuant to a three page "Memorandum of Understanding" dated November 10, 1987, the day the application was filed. One-O-Three Ex. 13. Ms. Meese, BDC and PNI signed the Memorandum on November 10, 1987. However FMBLP's limited partnership agreement was not signed until April 1989. Tr. 1382. Between the signing of the Memorandum of Understanding and the time the limited partnership agreement was signed, there was no other document reflecting the agreement of the parties. Tr. 1383.

139. The Memorandum of Understanding specifies the equity and ownership interests of the partners, and specifies which of them will be general and limited partners. One-O-Three Ex. 13. The Memorandum specifies that "Meese agrees to serve in a lead management position at the proposed station on a full time basis. Responsibilities and terms of compensation shall be mutually agreed on." The Memorandum of Understanding further provides that "a more detailed partnership agreement . . . will be developed and executed by the parties within thirty (30) days of the date hereof."

140. The Memorandum of Understanding does not specify a management role for the limited partner. However, it contains no provision of any sort insulating the limited partner from involvement in the management of the station or from day-to-day communication with the general partners. Insulating provisions do appear in the April, 1989 limited partnership agreement. Sacramento FM Exhibit 1, Attachment A, at 8-10.

141. Ms. Meese learned of the availability of the FM channel in late October 1987 (approximately two or three weeks before the application was filed). Tr. 1377. A social friend, Stephen Bailey, advised her of the availability of the channel. Mr. Bailey referred her to James Lindstrom, who is the Senior Vice President and General Manager of Broadcast Data. Tr. 1377; Sacramento FM Exhibit 3 at 6.

142. Before Ms. Meese was brought in, Broadcast Data and PNI already had decided to form the partnership and were looking for "a third member of a partnership." Tr. 1400. Communications counsel had been hired by Broadcast Data and PNI before Ms. Meese was brought in. Tr. 1385-86. Mr. Lindstrom hired the engineer. Tr. 1386.

143. Ms. Meese had no involvement in obtaining cost estimates for station construction and operation, or in obtaining the assurance that sufficient funds would be available to construct and operate the station. Tr. 1393. At her deposition, Ms. Meese testified that she did not know how much it would cost to construct and operate the station, or whether Sacramento FM would lease or purchase its broadcast equipment and its studio site. Tr. 1394-95.

144. Bella Meese has no attributable interest in any medium of mass communications. Sacramento FM Exhibit 3 at 1. PNI or its major stockholders have general partnership interests in two FM applications. Sacramento FM Exhibit 3 at 1-3.

145. PNI holds a 51% interest in PN Radio Company, a general partnership. PN Radio Company is an insulated general partner in Twin Rivers Communications Limited Partnership, licensee of WXMX, Upper Arlington, Ohio. PN Radio also holds a 30.7% interest in Radio Orlando, the permittee of WEZO at Orlando, Florida. PNI is also the licensee or tentative selectee of some 24 MDS and MMDS stations, none of which is located within the proposed service area.

146. Ms. Meese proposes to work at the station as general manager on a full-time basis (at least 40 hours per week) and will hold no other employment. Sacramento FM Exhibit 2 at 3-4. She will be responsible for the hiring and firing of all personnel, oversee station programming and the sales department, and represent the station in the community and in its dealings with the FCC. FMBLP Ex. 2. Mr. Parrott and Mr. Walker will assist her on as needed advisory basis.

147. From June 1983 to September 1984, Ms. Meese lived in Citrus Heights, which is located within the 1 mV/m contour. Currently, she resides in Folsom, California, just outside the 1mV/m service contour of the proposed station. She has been employed in Sacramento since 1984 and commutes to Sacramento daily. She proposes to move within the 3.16 mV/m city-grade contour of the proposed station prior to the grant of program test authority. Sacramento FM Exhibit 2 at 1.

148. Ms. Meese, a black female, has been involved in a variety of community, civic and charitable organizations, including the following:

Dates	Activity
January 1990 - present	Sacramento Chapter, California Congress of Republicans. Member.
January 1989 - January 1990	Crocker Art Museum, Sacramento. Member.
May 1988 - present	Terra Del Oro Girl Scouts Council. Member of the Public Relations Committee.

January 1988 - present	Comstock Club, Sacramento. Member since January 1988; The Comstock Club is a "conservative non-partisan" organization that "presents programs featuring speakers of national and international interest."
January 1988 - present	State Republican Party Central Committee. Member since January 1988.
1988 - present	County Republican Party Central Committee Alternate for the State Treasurer.
1988	Delegate to the Republican National Convention.
December 1986 - present	California Republican League, Sacramento. Member.
1985 - present	Women Appointee's Council. Member of Executive Committee. The Council presents a check to the governor's wife on an annual basis at Christmas to be given to a charity of her choice. Ms. Meese chaired a May 1988 benefit held by the Council for the California Vietnam Veterans Memorial.
1984	Sacramento Chapter of the California Black Republican Council. Member.
1983 - present	Republicans of River City, Sacramento. Member since 1983; Board Member since December 1987.
	Black Appointees Council. Member.

The Council was formed in 1985.

149. Sacramento FM proposes to install auxiliary generators at the studio and transmitter sites in order to supply power in the event of a power failure. Sacramento FM Ex. 4.

George K. Fung

150. George K. Fung is an individual applicant who presently resides in Arcadia, California. (Fung Ex. 1). Mr. Fung will be integrated into the operation of his proposed station and will work a minimum of 40 hours per week as the station's general manager. As the general manager, Mr. Fung will supervise and work with all station personnel, oversee all station operations, and supervise the selection of program material for broadcast.

151. Mr. Fung is currently employed at Star Tours, Inc. as the Executive Vice President and is a minor shareholder. Fung will terminate his employment at Star Tours as well as any other business involvements if his application is granted. (Fung Ex. 1, Tr. 1006-7).

152. Mr. Fung's present residence in Arcadia, California is outside of the proposed service area of the Sacramento facility. However, should his application be granted, he will move to Sacramento and establish permanent residence within the city limits. (Fung Ex. 1).

153. Mr. Fung is an Asian-American. He was born in China, of Chinese ancestry. (Fung Ex. 1).

154. Neither Mr. Fung, nor any member of his immediate family has any ownership interest in any medium of mass communications. (Fung Ex. 1).

155. Mr. Fung proposes to install auxiliary power generators at the transmitter and studio sites in order to ensure continuous operations in the event of a commercial power failure. (Fung Ex. 1).

156. Fung has no present broadcast experience, but has management business experience. He currently runs an office of 40 people, 36 full-time and 4 part-time staff. Tr. 1025. He will hire, among others, an experienced program director to assist him in the programming of the station. Tr. 1022.

COMPARATIVE COVERAGE

157. Based upon Joint Ex. 1, the following table lists the total areas and populations within the sponsoring applicants' 1mV/m contour. The data takes into account amendments by Olympic and Old Sacramento, since the amendments do no result in a comparative upgrading. With respect to Marszal, however, the data given is for her originial proposal. Reliance upon her amended proposal would constitute an impermissible comparative upgrading. *See Women's Broadcasting Coalition, Inc.*, 59 RR 2d 730, 733 (1986).

TOTAL AREAS AND POPULATIONS

Applicant	Area (sq. km.)	Population
Lizardo-Franich	1,665	753,184
Marszal	1,824	775,324
Media West	1,791	780,289
Old Town	1,776	775,075
Rio Americano	1,820	793,044
One-O-Three	1,825	774,966
Olympic	1,835	775,772
Fahlda	1,832	767,803
Old Sacramento	1,826	759,989
JAM	1,270	634,598
Powell	1,824	776,878
Sacramento FM	1,817	761,101
Fung	1,806	767,743

The applicants sponsoring Joint Ex. 1 stipulated that there are no underserved areas covered by any of their proposals.

III. CONCLUSIONS OF LAW

Lizardo-Franich Partnership

158. Apart from the bare statement that he will serve as president and general manager, there is no evidence that Mr. Lizardo will have a managerial function at the station. Mr. Lizardo's integration proposal contains no detail as to his specific duties at the station. Mr. Lizardo himself was unable to supplement his integration proposal, although given an opportunity to do so in cross examination. He tesified that he had no idea what his duties

would be as the general manager of the proposed station. Although, the General Manager position is identified in the *1965 Policy Statement* as a position for which integration credit would be awarded, Lizardo-Franich has presented no evidence that Mr. Lizardo's duties will, in fact, be those normally associated with such a position. Giving Mr. Lizardo the title of General Manager is not sufficient to prove that he will in fact perform a managerial role at the station. The fact that Mr. Lizardo was unable to state in even the most elemental terms his duties as General Manager confirms the lack of substance of his integration proposal. Lizardo-Franich has not met its burden of showing that Mr. Lizardo will in fact have a managerial position at the station and is entitled to no integration credit for Mr. Lizardo's integration proposal. *Doylan Forney*, 68 RR 2d 366, 371 (released September 5, 1990).

159. The integration proposal of Mr. Franich cannot be credited. He will be the "Vice-President" of the station. Lizardo-Franich's exhibits do not state what duties Mr. Franich will have as the vice president, and there is no evidence of just what Mr. Franich proposes to do. Lizardo-Franich has not met its burden of "showing the extent [of Mr. Franich's] policy functions and the likelihood of [his] playing important roles in management." *Doylan Forney*, supra. Absent such proof, Mr. Franich's integration proposal cannot be credited.

160. Furthermore, Mr. Franich's integration proposal is unbelievable. The evidence shows that Mr. Franich has two residences, one in Palos Verdes in Southern California, and one in Carmichael, which is in the Sacramento area. He spends half of his time in Palos Verdes and provided no evidence that this will change. Mr. Franich did not explain how he would effectuate his integration proposal from Palos Verdes. Mr. Franich has failed to show that his integration proposal can be effectuated. He has proposed an absentee role in an undefined position and he can receive no integration credit. *See Voce Intersectario Verdad America, Inc.*, 100 FCC 2d 1607, 58 R.R. 2d 445, 451 (Rev. Bd. 1985).

161. Mr. Lizardo has never lived within the proposed service area. Although he has proposed to work full-time at the station, he has not proposed to move to Sacramento or to the service area. Consequently, he receives no credit for local residence.

162. Mr. Lizardo is a Hispanic male. If he were to receive any integration credit, it would be enhanced by his minority status.

163. Lizardo-Franich would also receive a minor enhancement for the past broadcast experience of Mr. Lizardo, namely, his position on the board of directors for KPFK in Los Angeles, CA.

164. Mr. Franich does not reside full-time in Carmichael. Rather, he spends about six months of each year at his residence in Palos Verdes. Thus, at best, Lizardo-Franich would be entitled only to a slight enhancement for Mr. Franich's part-time residence in the service area, even assuming that Mr. Franich's intergration proposal could be credited.

165. Finally, Lizardo-Franich receives a very slight enhancement credit for its proposal to utilize auxiliary power.

166. Mr. Lizardo is a member of the board of directors of public radio station KPFK in Los Angeles, California. This is an advisory board which has some influence on the station's programming and on its hiring practices. The Commission has held a position such as Mr. Lizardo's, a member of the board of directors of a non-commercial station, is relevant under the diversification criterion. *San Joaquin Television Improvement Corp.*, 96 FCC 2d 594, 597, 54 R.R.2d 1206, 1209 (Rev. Bd. 1983). Consequently, since Mr. Lizardo has not proposed to discontinue his position on the board, Lizardo-Franich receives a very slight diversification demerit.

Susan Marszal

167. Marszal's request for summary decision on the limited financial issue is granted. The evidence shows that there is no question of material fact relating to Ms. Marszal financial qualifications. At all pertinent times, Marszal has been financially qualified, and remains so at the present time.

168. Ms. Marszal is entitled to a 100% quantitative integration credit. That credit is moderately enhanced by her female status, and moderately enhanced by her residence within the one 1mV/m contour of her proposed station's service area continuously since 1982. Additionally, Marszal receives a very slight enhancement for her proposal to install auxiliary power generating equipment.

Media West Broadcast Group, Inc.

169. Media West is entitled to 100% quantitative integration credit. Both of its integrated principals, Frank Adams and S. Frederick Quist, will work full-time at the station.

170. Mr. Quist is a long time resident of the service area; he will establish a permanent residence in Sacramento if Media West is awarded the construction permit. For one year, approximately seventeen years ago, Mr. Adams resided within the service area; he will move to Sacramento if Media West obtains the construction permit. Each of the principals has a reasonably substantial record of civic participation. Media West is entitled to moderate-to-substantial enhancement of its integration proposal for the service area residency, and promises of future local residency (combined with civic participation) of its principals. Additionally, very slight credit is awarded for the proposal to utilize auxiliary power. The broadcast experience of the Media West principals enhances the integration proposal to a slight degree.

Old Town Broadcasting Corporation

171. Old Town receives 100% quantitative integration credit. Both of its integrated principals, Wilbur Johnson and Brenda Johnson, will work full-time at the proposed station. That integration credit is substantially enhanced by virtue of the fact that Old Town's principals are members of a racial minority group. Slight enhancement credit is awarded for Mr. Johnson's broadcast experience, and very slight credit is awarded for the proposal to utilize auxiliary power.

Rio Americano Communications Corp.

172. Rio Americano receives 100% quantitative integration credit for its sole shareholder's proposal to work full-time as the general manager of Rio Americano's proposed station. The proposal is substantially enhanced by Mr. Ibarra's minority status. Ibarra's past long term local residency and the promise of future local residency, coupled with his participation and some Sacramento civic activities, entitles the applicant to a moderate additional

enhancement. Ibarra's broadcast experience warrants a slight qualitative enhancement, and Rio Americano is awarded a very slight enhancement credit for its proposal to utilize auxiliary power.

One-O-Three Broadcasting Co., Inc.

173. One-O-Three receives 100% quantitative integration credit for the full-time integration of its principals.

174. Mr. Corriveau has resided in the service area of the proposed station since June, 1980; since 1986 or 1987, he has lived within the city limits of Sacramento. Mr. Maurer has resided in the service area for twenty five years. Approximately two in a half years beginning in 1965, Mr. Maurer resided within the city limits of Sacramento. Both Corriveau and Maurer have been active in Sacramento area civic activites. Substantial enhancement of the integration proposal is awarded to One-O-Three for its principals residence/civic participation. Mr. Corriveau's broadcast experience warrants a slight enhancement of the integration proposal, and for its proposal to utlize auxiliary power, One-O-Three receives a very slight enhancement.

Olympic Broadcasters, Inc.

175. This applicant proposes no integration. Its various media interests, and those of its principals, warrant the assessment of a substantial diversification demerit.

Fahlda Broadcasting Company

176. Fahlda is entitled to 100% quantitative integration credit. Its general partner will work full-time at the proposed station. Integration credit is substantially enhanced by Ms. Nelson's local and area residence and civic participation, and is substantially enhanced by her racial minority status. Additonally, moderate enhancement is awarded because Ms. Nelson is a female. Very slight credit is awarded for Ms. Nelson's broadcast experience, and very slight credit is awarded for the applicant's proposal to utilize auxiliary power.

Old Sacramento Broadcasting Co., Inc.

177. Old Sacramento will receive 100% quantitative integration credit for the full-time participation of its two non-voting shareholders. The minimal involvement by non-voting shareholder Mateo Camarillo in the applicant's affairs after the application was filed does not detract from this conclusion. Those activities do not reflect that the non-voting shareholder participated in or controlled the applicant's decision making processees. *Coast TV*, 5 FCC Rcd. 2751 (1990).

178. The integration proposal is substantially enhanced by the local residence/civic participation of the integrated principals, substantially enhanced also by virtue of their minority group membership, and is moderately enhanced by Ms. Guzman's status as a female. Very slight enhancement credit is awarded for Ms. Guzman's broadcast experience, and slight credit is awarded for the applicant's proposal to utilize auxiliary power.

JAM FM Limited Partnership

179. JAM merits 100% quantitative integration credit for the full-time participation of its general partner Mr. Colley. Mr. Colley has committed to suspend his graduate studies and to terminate any employment which might affect his integration pledge.

180. The integration proposal is substantially enhanced by Mr. Colley's residency in Sacramento and his extensive participation in civic activities, and the proposal is also substantially enhanced by Mr. Colley's status as a member of a minority group. Slight enhancement is awarded for Mr. Colley's broadcast experience, and the applicant's proposal to utilize auxiliary power garners for the applicant a very slight enhancement.

Jack L. Powell

181. Mr. Powell is an individual applicant. He proposes to work at the station on a full-time basis as the general manager. He owns KJAY(AM), a daytime-only station licensed to Sacramento. Mr. Powell has personally and continously managed KJAY(AM) on a full-time basis since December 1965. If successful in this proceeding, Powell will divest himself of KJAY(AM) within three years of the commencement of program test authority on the FM station, within the period contemplated by the Commission's "daytimer preference" policies.

182. The record contains Mr. Powell's unequivocal commitment to full-time employment at the proposed FM station, and continuing devotion of *some* amount of reduced time to the operation of KJAY(AM). Powell has not indicated precisely how much time he will continue to devote to the operation of the AM station, but his integration proposal does not lack credibility because of it. Powell now works at least 40 hours per week at the AM station. Tr. 1302. He is one of only two workers at that station; Powell's assistant general manager is the other. That assistant general manager has worked with Powell at the AM station for ten years. Powell will make the time to effectuate his full-time commitment to the proposed FM station by placing more of the responsiblity for the running of the AM station in the hands of the assistant general manager.

183. Powell has put forth a reasonably specific plan for carrying out his integration commitment. That plan is also credible: Powell's long-time employee will have the major responsibility for the operation of the AM station; Powell is prepared to give his personal attention to the operation of that station only as it may be required and, in doing so, is prepared to extend his work-week so as to honor his full-time commitment to the proposed FM station. Powell's ability to function in this manner is bolstered by two additional facts. First, he has no other business demands on his time; (his only work is at the AM: "it's the only thing I do." Tr. 1300.) Finally, the studios and offices of both the AM and the FM stations will be located in the same building and most general administrative functions will be consolidated.

184. Powell will receive full integration credit for his proposal to devote full-time to the operation of the proposed FM station as its general manager. Since all of the criteria are met, Powell will also receive the "daytimer preference," resulting in the upgrading of the value of Powell's broadcast experience to the same level as minority ownership or local residence. *FM Broadcast Assignments*, 59 RR 2d 122 (1986).[2] Consequently, Powell's

100% quantitative integration proposal is substantially enhanced by his broadcast experience. The integration proposal is also substantially enhanced by Powell's long-time local residence and record of participation in local civic activities. Finally, Powell receives a very slight qualitative enhancement for his proposal to utilize auxiliary power.

Sacramento FM Broadcasters Limited Partnership (FMBLP)

185. Ms. Bella Meese, FMBLP's 35% general partner, will be fully integrated into station management, working at least 40 hours per week as the station's general manager. FMBLP receives 35% quantitative integration credit. That integration is substantially enhanced by Ms. Meese' status as a member of a racial minority group and, because Ms. Meese is a female, integration proposal receives additional moderate enhancement.

186. Ms. Meese currently resides just outside the service area. She resided within the 1mV/m service contour from June 1983 to September 1984, and she will move to and reside within the 3.16 mV/m contour upon grant of FMBLP's application. All of this, combined with Ms. Meese' record of civic participation in Sacramento and the surrounding service area, entitles FMBLP to a substantial enhancement of the integration proposal. Finally, the proposal to utilize auxiliary power enhances the integration proposal to a very slight degree.

187. FMBLP's non-integrated general partner PNI has a 51% general partnership interest in PN Radio Company. PN Radio Company has a 30.7% interest in Radio Orlando, the permittee of WEZO, Orlando, Florida. Thus, PNI can be attributed with only a 15.66% interest in WEZO, a station far away from the proposed Sacramento station. That interest, combined with PNI's interest in a number of MDS and MMDS services (none of which is located within the proposed service area), warrants the assessment of a slight diversification demerit.

George Fung

188. George Fung is an individual applicant who proposes to be the full-time (40 hour per week) general manager of the Sacramento FM station. Fung receives 100% quantitative integration credit. For his promise to move to Sacramento, Fung's integration proposal is slightly enhanced. The proposal is substantially enhanced by Mr. Fung's minority racial status. Finally, the proposal receives very slight enhancement for Fung's proposal to install auxiliary power generators at the transmitter and studio sites in order to ensure continuous operations in the event of a commercial power failure.

COMPARATIVE COVERAGE

189. Even where, as here, the area to be covered is well served, an applicant proposing to serve a substantially greater population is entitled to a small preference. *Simon Geller*, 90 FCC 2d 250, 268-68, 276 (1982) (subsequent history omitted). In the instant case, the difference between the largest population, the 793,044 to be served by Rio Americano, and the lowest, 634,598 by JAM, is close to 25%. Lizardo-Franich, whose population figures are closest to JAM's, would still serve nearly 19% more persons than JAM. Since all of the other applicants' superiority over JAM is within this range, all are entitled to a slight preference over JAM. Neither is entitled to a preference *vis a vis* each other, however, because their proposals do not differ sufficiently. Specifically, excluding JAM, the differences between the sponsoring applicants amount to 5% at the most. This is not a substantial difference when the area is well served. *Compare Cotton Broadcasting Company*, 104 FCC 2d 473 (Rev. Bd. 1986) (7.5% difference warrants very slight preference only.)

190. Accordingly, Lizardo-Franich, Marszal, Media West, Old Town, Rio Americano, One-O-Three, Olympic, Fahlda, Old Sacramento, Powell, Sacramento FM, and Fung are each entitled to a slight comparative coverage preference over JAM.

ULTIMATE CONCLUSIONS

191. The following two applicants receive some degree of diversification demerit:

Olympic Broadcasters
Sacramento FM

192. Those two applicants, along with Lizardo-Franich Partnership, receive less than 100% quantitative integration credit. All other applicants receive 100% quantitative integration credit. Of those, the following applicants are each awarded but *one substantial* qualitative enhancement:

Marszal
Media West
Old Town

Rio Americano
One-O-Three
Old Sacramento
Fung

193. Those applicants whose 100% quantitative integration proposals receive *more than one substantial* qualitative enhancements are:

Fahlda
JAM
Powell

194. Apart from the 100% substantial enhancement for racial minority status awarded to these three applicants (including Powell who, although not a minority group member, receives a "daytimer preference" upgrading the value of his broadcast experience to a level equivalent to the value of minority group membership), the other qualitative enhancements awarded these three applicants are as follows:[3]

195. *Fahlda*: *substantial*, for long time local residence, coupled with extensive local civic participation; *moderate*, for female status; *slight*, for broadcast experience.

196. *JAM*: *substantial*, for lifetime local residence and extensive local civic participation; *slight*, for broadcast experience.

197. *Powell*: *substantial*, for long-time local residence and extensive local civic participation.

198. Fahlda is the preferred applicant herein. Its qualitative enhancements outweigh those of JAM (second in this ranking) and those of Powell.[4]

199. Accordingly, IT IS ORDERED THAT unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion, the Application of Fahlda Broadcasting Company (File No. BPH-871110NB), IS GRANTED and the Applications of Lizardo-Franich Partnership (File No. BPH-871109MF), Susan Marszal (File No. BPH-871110ME), Media West Broadcast Group (File No. BPH-871110MF), Old Town Broadcasting Corporation (File No. BPH-871110MI), Rio Americano Communications Corp. (File No. BPH-871110MM), One-O-Three Broadcasting Co. (File No. BPH-871110MT), Olympic Broadcasters (File No. BPH-871110MY), Old Sacramento Broadcasting Co. (File No. BPH-871110NJ), JAM FM Limited Partnership (File No. BPH-871110NL), Jack L. Powell (File No. BPH-871110NM), Sacramento FM Broadcasters Limited Partnership (File No. BPH-871110NQ), and George K. Fung (File No. BPH-871110NU), ARE DENIED.[5]

FEDERAL COMMUNICATIONS COMMISSION

Edward Luton
Administrative Law Judge

FOOTNOTES

[1] The designation order permitted the adduction of comparative coverage evidence under the standard comparative issues. Joint Ex. 1, entered by all the remaining parties, contains the following stipulation:

> The applicants sponsoring this exhibit stipulate to the fact that there are no unserved or underserved areas covered by any of their proposals and that they therefore disclaim any comparative advantage for service to unserved or underserved areas. Each such applicant reserves, however, the right to argue credit, if any, arising from a given proposal exceeding another proposal or proposals in terms of absolute coverage area or absolute population served or both.

[2] The five criteria an applicant must meet to receive a daytimer preference are the following:

> 1) The FM allotment applied for must be in the same community as the day-time only station;
>
> 2) The applicant must have owned the day-time only facility for three continuous years prior to the filing of its FM application;
>
> 3) The day-time only applicant must pledge to divest the AM facility within three years after the commencement date of FM operations;
>
> 4) Members of the applicant entity holding cognizable ownership interests must have spent more than twenty hours per week participating in the management of the day-time only facility during the three year period prior to filing the FM application; and
>
> 5) the applicant must propose to be integrated in the operation of the FM station.

[3] This ranking also excludes credit for the proposaed use of auxiliary power, since each applicant proposes its use.

[4] Comparative coverage considerations do not affect this ranking.

[5] In the event exceptions are not filed within thirty (30) days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective fifty (50) days after its release pursuant to Section 1.276 (d) of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-86

In re Applications of

CHANNEL 32 BROADCASTING COMPANY	File No. BPCT-861215KS
KANSAS CITY SKYWAVE, INC.	File No. BPCT-861216K2
T.V. 32, INC.	File No. BPCT-861216K4
HOLT LIMITED PARTNERSHIP	File No. BPCT-861216K7
KANSAS CITY TELEVISION, LTD. (KZKC(TV))	File No. BPCT-861216K8

For Construction Permit for a
New Television Station
Kansas City, Missouri

MEMORANDUM OPINION AND ORDER

Adopted: February 20, 1992; Released: February 28, 1992

By the Commission:

1. Now before us are Petitions for Reconsideration filed October 4, 1991 by Channel 32 Broadcasting Company (Channel 32) and Kansas City Skywave, Inc. (Skywave) and related pleadings.[1] These applicants seek a reversal of our Memorandum Opinion and Order in this case granting the application of T.V. 32, Inc. (TV 32). *Channel 32 Broadcasting Company*, 6 FCC Rcd 5188 (1991).

2. The Commission does not generally entertain petitions to reconsider its denial of applications for review unless the petition is based either on facts or circumstances which have changed since the last opportunity to present such matters or facts unknown to petitioner until after the last opportunity to present such matters. 47 C.F.R. § 1.106(b)(2).

3. Both Channel 32 and Skywave admit that they do not meet the general requisites of Section 1.106. Channel 32, however, claims that its arguments concerning the Review Board's decision were not addressed by the Commission and Skywave argues that the Commission improperly based its decision on extra-record material. For the reasons discussed below, we will dismiss both petitions for reconsideration.

I. Channel 32

4. In its petition, Channel 32 argues that the Commission failed to address its "very serious and compelling arguments . . . consistent with the Presiding Judge's conclusions below," that TV 32 was not entitled to 100 percent integration credit because of the active participation of TV 32's debenture holders and the convertible nature of the debentures.[2] It is well established that we will not grant reconsideration simply to debate matters previously considered and disposed of by the Commission. *See WWIZ, Inc.*, 37 FCC 685 (1964) *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). In our decision denying the applications for review, we stated clearly that we had reviewed "the record and the pleadings filed by all the parties" and found the Board's resolution of this case to be reasonable except as noted in our order.[3] *Channel 32 Broadcasting Company*, 6 FCC Rcd at 5188 ¶ 3. The Commission need not discuss each and every allegation raised by a party filing an application for review. As in the case before us, those matters argued but not specifically addressed in our decision are deemed to have been adequately considered by the board and thus no useful purpose would be served by giving them further attention.

II. Skywave

5. Skywave objects to the Commission's reliance on data submitted by the parties pursuant to the General Counsel's request.[4] Skywave argues that it had no opportunity "to review, challenge, test, rebut or even object to" the material, and yet the Commission treated the data as "evidence which was of critical decisional significance in resolving the comparative coverage issue." Skywave Petition for Reconsideration at p.3. Skywave argues that reliance on material not offered into evidence is unlawful, and it cites *United States v. Abilene Southern Railway Co.*, 265 U.S. 274, 288 (1924), for the proposition that nothing can be treated as evidence which is not introduced as such. Furthermore, Skywave contends that Section 556(d) of the Administrative Procedure Act entitles it to submit rebuttal evidence and to conduct such cross-examination as may be required for a full and true disclosure of the facts. *See* 5 U.S.C. § 556(d).

6. However, in the situation before us, we were dealing with a simple augmentation of data already in evidence by consideration of non-controversial public information on file with the Commission. The ultimate conclusions were a result of the application of well accepted engineering standards. In fact, the Mass Media Bureau reviewed the calculations and confirmed that they were based on accepted engineering standards. Although entitled to do so, Skywave filed no contrary data. In light of the above, Skywave has not been deprived of any opportunity to contest or challenge the accuracy of the data.

7. Moreover, Skywave has failed to demonstrate that it has been adversely affected by our consideration of the supplemental engineering exhibit. The Review Board found, on the basis of the record before it, that TV 32 and Skywave were entitled to a substantial comparative coverage preference that was dispositive in this case. The Board then concluded that as between TV 32 and Skywave, TV 32 was preferred based on its quantitative integration superiority. Except for the Board's failure to consider noncommercial educational signals in the com-

parative coverage analysis, we agreed with and affirmed the Board's handling of this case. Thus, even if we had not differed with the Board's handling of the question of whether to include noncommercial educational signals in the comparative coverage analysis, Skywave would not have been the preferred applicant.

8. Our analysis of the probable effect that noncommercial educational signals might have on the case concluded that TV 32 and Skywave would still be entitled to a dispositive preference over the other applicants. Because of our affirmance of the Board on the other comparative questions, the preference of TV 32 over Skywave based on its integration proposal remained the same. Therefore, as to Skywave's comparative status vis-a-vis the prevailing applicant in this case, the information submitted in the supplemental engineering exhibit was of no decisional significance.

9. Neither Channel 32's nor Skywave's petition for reconsideration contain any arguments that rely on facts or circumstances which relate to events that have occurred or were discovered since the filing of its application. Nor do we find any other basis upon which to conclude that the contested rulings in this case warrant rehearing. Consequently, the public interest will be best served by the dismissal of both petitions for reconsideration.

10. ACCORDINGLY, IT IS ORDERED, That the Petitions for Reconsideration filed by Channel 32 Broadcasting Company and Kansas City Skywave, Inc., on October 4, 1991, ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The following additional pleadings are before us: (1) Opposition of T.V. 32, Inc. (TV 32) to Channel 32's Petition for Reconsideration filed October 17, 1991; (2) Opposition of Kansas City TV 62 Limited Partnership (KCTV 62) to Channel 32's Petition for Reconsideration filed October 17, 1991; (3) Opposition of Channel 32 to Skywave's Petition for Reconsideration filed October 17, 1991; (4) Mass Media Bureau's Opposition to Skywave's Petition for Reconsideration filed October 17, 1991; (5) Skywave's Reply to Channel 32's opposition filed October 30, 1991; (6) TV 32's Motion for Leave to File Pleading filed November 25, 1991 and (7) TV 32's Supplement to Opposition to Channel 32's Petition for Reconsideration filed November 25, 1991.

[2] In addition, Channel 32 submits that the Commission did not consider its argument that TV 32 is not entitled to integration credit for its 60 percent voting stockholder, Robert Liepold, because he will not be involved in the day-to-day management of the proposed station. These allegations merely reargue contentions advanced throughout this proceeding, which we, the Board and the ALJ properly rejected, based on Liepold's overall testimony and his past experience as an executive officer.

[3] Both Channel 32 and Skywave cite our statement that we would "briefly address some" of the parties' arguments that TV 32 is not entitled to 100 percent integration credit, but claim that we did not discuss the effect of debenture holders' interests on TV 32's showing. In light of our acceptance of the Review Board's analysis in this regard, 6 FCC Rcd at 5189 ¶ 13 (first sentence) and ¶ 14 (last two sentences), no further consideration is required.

[4] The Office of General Counsel requested the parties to augment their joint engineering exhibit to include data relating to noncommercial educational stations. The parties were encouraged to do so by stipulation but were given the opportunity to submit their own data in which case the Mass Media Bureau was requested to comment on the positions of the applicants. *See Channel 32 Broadcasting Company*, FCC 91I-029, released April 23, 1991.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-343

In re Applications of

Francisco Resto Torres d/b/a NAGUABO BROADCASTING COMPANY — File No. BPH-861023MA

REYES RUIZ RIVERA — File No. BPH-861027MF

HECTOR NEGRONI CARTEGENA — File No. BPH-861027MH

EFRAIN ARCHILLA-DIEZ — File No. BPH-861027MI

For Construction Permit for
New FM Station, Channel 225A,
Naguabo, Puerto Rico

MEMORANDUM OPINION AND ORDER

Adopted: February 20, 1992; Released: February 28, 1992

By the Commission:

I. INTRODUCTION

1. The Mass Media Bureau and Naguabo Broadcasting Company (NBC) seek reconsideration of a Commission memorandum opinion and order which upheld the grant of an application by Efrain Archilla-Diez (Archilla) for a new FM radio station in Naguabo, Puerto Rico, and the denial of mutually exclusive applications by Naguabo Broadcasting Company (NBC), Reyes Ruiz Rivera (Ruiz), and Hector Negroni Cartagena. *Naguabo Broadcasting Co.*, 6 FCC Rcd 4879 (1991). *See also Naguabo Broadcasting Co.*, 6 FCC Rcd 912 (Rev. Bd. 1991), *affirming*, 5 FCC Rcd 2062 (I.D. 1990).[1] We will deny reconsideration, but we will modify our action in one respect.

II. BACKGROUND

2. In this proceeding, the Commission found that Archilla had a decisive preference over Ruiz and NBC for integration of ownership into management. Like the Board, the Commission eliminated Negroni from comparative consideration because he failed to justify a waiver of 47 C.F.R. § 73.315, the principal community coverage rule. 6 FCC Rcd at 4880 n.5. However, the Commission reversed the Board's ruling denying Ruiz a waiver of 47 C.F.R. § 73.207, the minimum spacing rule, while granting waivers to NBC and Archilla. The Commission held that, when the distance between Ruiz' proposed facility and co-channel station WTPM in Aguadilla, Puerto Rico, is rounded off, as specified in 47 C.F.R. § 73.208(c)(8), Ruiz' proposal is no more short-spaced than those of Archilla and NBC. (Without rounding off, NBC and Archilla are short-spaced by 3.01 km and Ruiz is short-spaced by 3.35 km.) *Id.* at 4879 ¶ 6.

3. The Commission credited both Archilla and NBC with 100 percent full-time integration, but denied Ruiz full-time integration credit. In this regard, the Commission found that Ruiz had not set forth a specific credible plan for accommodating his outside business interests with his plan for full-time integration at the proposed station. 6 FCC Rcd at 4880 ¶ 8. As between Archilla and NBC, the Commission upheld the Board's ruling that Archilla's advantages for local residence/civic participation and broadcast experience were decisive. (Additionally, the Commission held that, even if the Archilla and Ruiz proposals were quantitatively equal, Archilla's qualitative advantages would prevail. *Id.* at 4880 ¶ 9.)

III. NBC'S PETITION FOR RECONSIDERATION

4. NBC contends that: (1) the Commission erred in failing to impose a diversification demerit against Archilla, and (2) the Commission gave insufficient weight to NBC's slight advantage over Archilla for comparative coverage.[2] NBC also contends that new evidence indicates that Archilla violated the Commission's reporting rule, 47 C.F.R. § 1.65, by failing to report a newly acquired media interest and that he misrepresented his relationship with another station.

5. NBC notes that the Commission declined to attribute to Archilla any interest in station WALO in Humacao, Puerto Rico, a station owned by Archilla's father. 6 FCC Rcd at 4881 n.9. We held that, although Archilla currently serves as the vice president, treasurer, a director, and general manager of the station and its licensee, he had made a timely and effective pledge to sever his relationship with WALO. NBC asserts that Archilla's pledge was not effective with respect to his position as vice president because in his divestiture pledge he did not specifically mention that position, as opposed to his positions as treasurer, director, and general manager. According to NBC, the Commission has a long-standing policy of requiring applicants to report specific interests that they pledge to divest.

6. NBC however, has failed to substantiate its claim that an error was committed in this case. Cases cited by NBC, such as *Northland Communications*, 100 FCC 2d 914, 919 ¶ 9 (Rev. Bd. 1985), hold only that a timely and effective divestiture pledge must be made to avoid attribution. These cases provide no support for NBC's argument that Archilla's divestiture pledge was ineffective with respect to his position as vice president, since: (1) Archilla clearly stated his intention to sever *all* relationships with WALO, both to the Commission and to his father, and (2) as NBC admits,[3] Archilla's failure specifically to mention his vice presidency was apparently inadvertent.

7. NBC further notes that the Commission, citing *Jarad Broadcasting Co., Inc*, 1 FCC Rcd 181, 190 ¶ 49 (Rev. Bd. 1986), found that Archilla's preference for integration outweighed NBC's slight preference for comparative coverage. NBC maintains that Archilla's integration preference was also no more than slight, and that *Jarad* is incorrect in holding that a slight integration preference receives intrinsically greater weight than a slight comparative coverage preference.

8. *Jarad*, however, accurately reflects Commission policy regarding the relative significance of slight integration and comparative coverage preferences. In our *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395 (1965), the Commission described integration as a factor of "substantial importance." As to comparative coverage (*i.e.*, efficient use of frequency), the Commission stated only that this factor "can and should be considered." *Id.* at 398. Moreover, we have held consistently that the weight to be given this criterion diminishes significantly where, as in this case, the area to be served already receives ample signals. *See Simon Geller*, 90 FCC 2d 250, 276 ¶ 50 (1982), *recon. denied*, 91 FCC 2d 1253 (1982), *rev'd on other grounds sub nom. Committee for Community Access v. FCC*, 737 F.2d 74 (D.C. Cir. 1984).

9. NBC next faults Archilla for failing to report his father's acquisition of station WVCF in Ocoee, Florida, in July 1989 (after the close of the record). NBC asserts that the record should be reopened to explore Archilla's relationship with WVCF, for diversification purposes, and the significance of his failure to report these circumstances. Archilla, however, states that he has no connection at all with WVCF and no motive to conceal. NBC provides no evidence that Archilla is connected with WVCF or that he deliberately failed to report the acquisition of this station. Thus, we see no basis to pursue NBC's allegations further. *See Merrimack Valley Broadcasting, Inc.*, 55 RR 2d 23, 25 ¶ 13 (1983).

10. As a related matter, NBC accuses Archilla of misrepresenting his relationship with station WAMA in Tampa, Florida, another station owned by his father. NBC claims that its principal, Francisco Resto Torres, was informed by a "former employee of WAMA(AM), who had personal knowledge of these matters," that Archilla spends two weeks every other month working in Florida rather than the few days a year that Archilla testified to in this proceeding. 6 FCC Rcd at 4881 n.9 (holding that this relationship was not cognizable for diversification purposes). NBC urges that this hearsay should be considered because it is reliable.

11. We find NBC's allegations unworthy of consideration. NBC fails to support its allegations with an appropriate statement by an individual with personal knowledge. *See* 47 C.F.R. § 1.229(d). NBC provides no substantiation of the "former" employee's identity,[4] personal knowledge, or credibility. Under these circumstances, NBC's allegations are entitled to no weight and warrant no further consideration.

IV. THE BUREAU'S PETITION FOR RECONSIDERATION

12. The Bureau takes issue with the Commission's rationale for granting Ruiz a waiver of the short-spacing rule, 47 C.F.R. § 73.207. By way of background, the provisions of 47 C.F.R. § 73.207 in effect when the Naguabo applications were filed require a Naguabo facility to be 163 km from co-channel station WTPM(FM) in Aguadilla, Puerto Rico. The record indicates that the NBC and Archilla proposals (using the same site) would be 159.99 km from WTPM(FM) (short-spaced by 3.01 km), and that the Ruiz proposal would be 159.65 km from WTPM(FM) (short-spaced by 3.35 km). Blanco Exh. 7, Att. H; Negroni Exh. 10 at 2.

13. To justify short-spacing, an applicant must make a threshold showing that: (1) no suitable fully-spaced site is available and (2) that the site proposed is the least short-spaced of the suitable sites available. *See, e.g., Megamedia*, 67 FCC 2d 1527, 1528 ¶ 4 (1978). The Commission noted that under 47 C.F.R. § 73.208(c)(8) distances computed are rounded off to the nearest kilometer. 6 FCC Rcd at 4879 ¶ 6. Therefore, the Commission held that Ruiz could claim a short-spacing of 3 km, and that therefore the site proposed by NBC and Archilla is not less short-spaced than Ruiz'.

14. The Bureau agrees with the Commission that Ruiz is entitled to a short-spacing waiver, since the Bureau considers the difference between the Ruiz proposal and those of Archilla and NBC (0.34 km) *de minimis*. Nonetheless, the Bureau urges that the Commission should not use the rounding-off provision of 47 C.F.R. § 73.208 when comparing the applicants' spacing deficiencies in evaluating whether to waive 47 C.F.R. § 73.207. The Bureau indicates that in processing applications it does not apply the rounding-off provision under these circumstances.

15. According to the Bureau, the rounding-off provision should be used only in determining whether a proposal complies with the rule and not in determining whether a waiver should be granted. The Bureau points out that in *Sunshine Group Broadcasting*, 2 FCC Rcd 4723 n.3 (1987), *citing, Kenter Broadcasting Co.*, [62 RR 2d 1573, 1577 n.9 (1986)], the Commission held that distances should not be rounded off in determining whether a short-spacing violation was *de minimis*. *See also Corydon Broadcasters, Ltd.*, 2 FCC Rcd 7521, 7522 ¶ 12 (Mass Med. Bur. 1987).

16. The Bureau argues that rounding-off could produce anomalous results in waiver cases such as this one. For example, proposals short-spaced by 29.51 km and 30.49 km, respectively, would each round-off to 30 km, justifying equivalent treatment, although the difference in computed distance would be nearly 1 km. In contrast, proposals short-spaced by 29.51 km and 29.49 km would round-off to 30 km and 29 km respectively, making equivalent treatment inappropriate, although the difference in computed distance would be only 0.02 km. Additionally, the Bureau asserts that rounding-off would permit site relocations under 47 C.F.R. § 73.207(a) that would, as reflected in its first example, exacerbate the short-spacing of the stations involved.

17. Ruiz responds that rounding-off represents a clear and consistent application of the rules. In Ruiz' view, not rounding off would produce anomalous results.

18. Upon considering the parties' further arguments, we conclude that the proper use of the rounding-off provision is unclear. As we noted in our prior memorandum opinion and order (6 FCC Rcd at 4879 ¶ 6), 47 C.F.R. § 73.208 indicates on its face that the rounding-off provision applies categorically to all distance calculations. Thus, we stated in a past case:

> . . . all of our FM rules specifying a minimum mileage separation [] require[] a computation of distance between the coordinates of two transmitter sites. In this regard, any applicant or interested party must nessarily rely on section 73.208 of the Rules, which is identified as "Reference points and distance computations." This is the only section in which we provide a means for such a computation.

> Furthermore, as indicated by the [Bureau], we recognize that any method of determining distance on the spheroidal surface of the earth involves inherent inaccuracies. Therefore, we are of the view that this method of rounding off to the nearest mile[5] provides a consistent and fair means of determining distance for all parties concerned.

Brown Broadcasting Service, Inc., 59 FCC 2d 167, 169 ¶ 6 (1976). We are unable to discern from the face of that decision the basis for our subsequent admonition in *Sunshine* that the rounding-off provision does not apply in determining whether a short-spacing is *de minimis*.

19. Apparently, views regarding the rounding-off provision have changed since *Brown*. We note, for example, that for several years, the television minimum separation rules, unlike the FM rules, have provided for rounding distances to the nearest 0.1 km, rather than to 1 km, although the computations are otherwise identical. 47 C.F.R. § 73.611(d); 50 Fed. Reg. 23697 ¶ 4 (Jun. 5, 1985). Thus, it appears that assessments of the accuracy of such computations may have changed. *See also Review of Technical Parameters*, 2 FCC Rcd 5693, 5697 ¶¶ 37-40 (1987) (increasing the precision of the relevant computations).[6] Additionally, the Bureau is correct that rounding-off does have the potential to produce the kind of anomalous results described in paragraph 16, above. Thus, further consideration of the rounding-off provision and its use may be warranted.

20. We see no need to resolve this matter in the present case. We find that Ruiz is entitled to rely in this case on the plain language of the rule, which provides for rounding-off. In this regard, the Bureau itself agrees that rounding-off under the circumstances of this case would not produce an unreasonable result. In any event, even given the benefit of rounding-off, Ruiz does not prevail in this case.

21. In terms of the prospective application of the rounding-off provision, it is desirable that it be examined comprehensively and not in a piecemeal fashion, because it potentially applies in several contexts. Thus, not only will we modify our previous holding, as reflected above, but we will also direct the Bureau to reexamine 47 C.F.R. § 73.208 in light of the foregoing analysis and propose revision of the rule as it may deem appropriate.

V. ORDERS

22. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration filed September 16, 1991 by Naguabo Broadcasting Company IS DENIED and the Mass Media Bureau's Petition for Reconsideration filed September 16, 1991 IS GRANTED to the extent that 6 FCC Rcd 4879 ¶ 6 IS MODIFIED as reflected above and that it IS DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Now pending before the Commission are: (1) the Mass Media Bureau's Petition for Reconsideration filed September 16, 1991, and an opposition filed October 1, 1991 by Ruiz; and (2) a Petition for Reconsideration filed September 16, 1991 by NBC, an opposition filed October 1, 1991 by Archilla, and a reply filed October 11, 1991 by NBC.

[2] NBC also complains that the Commission did not address its contentions regarding the abuse of process issue NBC sought against Archilla. The Commission, finding the Board's treatment of this matter adequate, denied review without comment pursuant to 47 C.F.R. § 1.115(g).

[3] Reply to Opposition Petition for Reconsideration filed October 11, 1991 by NBC at ¶ 5.

[4] Although NBC does not explicitly identify the former employee in question, he apparently is Marcelino Moyett-Saldana. In response to NBC's allegation, Archilla submitted a declaration by Moyett. Moyett claims that Resto offered to pay him to sign a statement falsely saying that Archilla spent more time at WAMA than Archilla admits. In his responsive declaration, Resto denies that he offered to pay Moyett and claims that Moyett admitted to him that Resto's allegations against Archilla are true. Because NBC does not prevail in this proceeding in any event, there is no need to resolve the conflicts in the Resto and Moyett statements.

[5] This case was decided before conversion to the metric system.

[6] *Compare* 47 C.F.R. § 73.208 (Oct. 1, 1986) *with* 47 C.F.R. § 73.208 (Oct. 1, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-403

In re Application of

EVANSVILLE SKYWAVE, INC. File No. BPH-870430OK

For Construction Permit for
New FM Station, Channel 298A,
Evansville, Indiana

MEMORANDUM OPINION AND ORDER

Adopted: February 20, 1992; Released: February 28, 1992

By the Commission:

I. INTRODUCTION

1. Before the Commission is a decision of the Review Board denying the application of Evansville Skywave, Inc. (ESI) for a new FM radio station in Evansville, Indiana. *Evansville Skywave, Inc.*, 6 FCC Rcd 5373 (1991).[1] *See also Evansville Skywave, Inc.*, 6 FCC Rcd 1356 (I.D. 1991). The Board disqualified ESI under an issue added by the ALJ to determine whether ESI misrepresented facts concerning the validity of its organization as a two-tiered corporation. The Board found that ESI's purported two-tiered ownership structure was a sham designed to artificially exploit the Comission's comparative licensing process.

2. For the reasons that follow, we disagree with the Board's disqualification of ESI. We will, therefore, remand this proceeding to the Board to consider exceptions that the Board previously deemed moot.

II. BACKGROUND

3. ESI is the sole remaining applicant in what was originally a multi-party comparative proceeding for a new FM radio station. It is organized as a two-tiered stock corporation. Sondra Matthews, ESI's only common (voting) stockholder, holds a 25 percent equity interest. The remaining 75 percent equity interest is held by Skywave Communications Corporation (SCC). ESI's sole preferred (nonvoting) stockholder.

4. The Board, affirming an initial decision by Administrative Law Judge Edward J. Kuhlmann (6 FCC Rcd 1356 (I.D. 1991)), as to the issue the ALJ added, found that ESI's purported two-tiered structure was a sham and that Matthews did not actually exercise sole voting control over ESI. According to the Board, SCC, and especially its president, Lee Perkinson, represents the true "driving force" behind ESI. 6 FCC Rcd 5373 ¶ 4. The Board concluded that, if this were still a comparative proceeding where such a finding would penalize ESI by denying it any comparative credit for the integration of Matthews into management of the proposed station, it would go no further, since, without integration credit, ESI would likely not prevail over any competing applicants in any event. *Id.* at 5373 ¶ 3. However, because ESI is the only applicant left in this proceeding, the Board concluded that it must consider whether ESI's sham structure renders it unqualified to be a licensee. *Id.*

5. The Board based its adverse findings concerning ESI's ownership structure mainly on the circumstances surrounding ESI's formation. The Board found that these circumstances were similar to those in cases in which the Commission had discounted an applicant's two-tiered organization as unreliable. The Board found that Matthews, who is a member of a minority group and has no broadcast experience,[2] contributed only $1,000 to ESI, whereas SCC funded and guaranteed the bank account out of which all of ESI's expenses were paid. 6 FCC Rcd at 5373 ¶ 5, 5375 ¶ 13.

6. The Board found that the manner in which ESI was formed and its application prepared was particularly probative of SCC's control. Perkinson or SCC applied for FM radio stations in more than 10 communities. 6 FCC Rcd at 5374 ¶ 6. In nearly all cases, the applicants had the same 25-75 percent ownership formula employed here. In Evansville, Perkinson initially attempted to recruit a woman named Marion Hite as the local (common) stockholder. *Id.* Hite declined but gave Perkinson Matthews' name. Matthews knew that a frequency was available in Evansville, but took no action until Perkinson called her, told her that he was willing to finance an application, and told her that he was looking for a local resident to participate in the venture. *Id.* at 1357 ¶ 7. After several phone calls, Matthews agreed to participate. *Id.*

7. Matthew's assumed her stock interest after a single, April 1987 meeting with Perkinson in the office of SCC stockholder Philip Kappes, who served as ESI's local counsel. 6 FCC Rcd at 5374 ¶¶ 6-7. (The law firm of SCC stockholder Douglas McFadden serves as ESI's communications counsel.) Kappes had already drafted the relevant corporate documents and Matthews did not negotiate her ownership interest or meet with other SCC stockholders.

8. The Board especially faults ESI for suggesting at the hearing that Matthews played a more substantial role in the preparation of ESI's application than she actually did. 6 FCC Rcd at ¶¶ 7-8, 5375 ¶ 12. Specifically, the Board criticized testimony indicating that: (1) Matthews hired ESI's attorneys and engineering consultants, (2) Matthews arranged to acquire ESI's transmitter site, and (3) Matthews arranged for the bank loan on which ESI relies to establish its financial qualifications.

9. In the Board's view, the record indicates that Matthews' involvement was less substantial than this testimony suggested. According to the Board, Matthews merely approved attorneys and consulting engineers already used by Perkinson and SCC, without discussing any fee arrangements with those professionals. [3] As to the transmitter site, Matthews gave the site owners a form letter prepared by Perkinson and sent the signed letter back to Perkinson. Several months later, Perkinson secured a further letter from the site owners without consulting Matthews. Similarly, with respect to the bank letter, Matthews approached a banker recommended by

Perkinson. The banker, who had already discussed the matter with Perkinson, provided a letter based on his prior familiarity with SCC and its principals.[4]

10. Finally, the Board noted that ESI's articles of incorporation contain a provision that would likely permit SCC to obtain voting control of ESI through the conversion of its preferred stock to common stock. 6 FCC Rcd at 5374 ¶ 9. (The articles provide that this conversion will occur unless ESI purchases SCC's stock for fair market value by May 1, 1993.)

11. In view of the foregoing, the Board concluded that SCC had actual operational control over ESI and that Matthews had no control other than for ministerial acts. 6 FCC Rcd at 5375 ¶ 12. Thus, the Board concluded that ESI's purported two-tiered structure was a simulacrum designed to artificially avoid the attribution of SCC's ownership interest. *Id.* at 5375-76 ¶ 14. The Board considered such a use of a sham structure a disqualifying abuse of the Commission's processes. *Id.*

12. Both ESI and the Bureau argue that, even assuming that ESI's two-tiered ownership structure is deemed defective for comparative purposes, ESI has not committed disqualifying misconduct. These parties assert that ESI has not concealed material information, made false statements of material fact, or intended to deceive the Commission. They further assert that, in the absence of such misconduct, disqualification is unwarranted and that the fact that denial of comparative credit is not an option in this proceeding is irrelevant. ESI also stresses that the Commission's treatment of two-tiered applicants has evolved in recent cases, and maintains that ESI cannot be faulted for failing to comply with standards that had not been enunciated when ESI was formed. Specifically, ESI notes that Perkinson's allegedly excessive participation in the applicant's affairs occurred before ESI had been formally incorporated. In any event, ESI contends that the record demonstrates that ESI is a *bona fide* two-tiered corporation, which the Commission (and the Bureau) recognize as a legitimate means of fostering minority ownership.[5]

III. DISCUSSION

13. We agree with the applicants for review that the Board's analysis of this case is faulty. In castigating ESI's ownership structure as a "sham," the Board has not sufficiently taken into account the distinction between finding a proposal unreliable for comparative purposes and finding that an applicant's proposal reflects disqualifying misconduct.

14. The Commission has discussed this distinction in past cases. In *Royce International Broadcating*, 5 FCC Rcd 7063, 7063-64 ¶¶ 7-8 (1990), *recon. denied*, 6 FCC Rcd 2601 (1991), the Commission explained that in evaluating the validity of an applicant's stated ownership structure for comparative purposes, we focus on the question of whether the applicant has met its burden of demonstrating reasonable assurance that its proposal will be effectuated as described. The Commission stated that:

> To the extent an applicant's conduct or intentions are demonstrably at odds with its described ownership structure, the applicant has unquestionably failed to meet its burden of showing that its proposal is reliable. . . .

Id. at 7064 ¶ 8. An applicant's failure to meet its burden in this regard, however, does not, without more, establish that the applicant has committed disqualifying misconduct. Thus, in *Royce*, the Commission noted that a disqualifying issue would be added in particularly egregious cases where it appeared that an applicant's proposal was not only unreliable but contained false statements amounting to disqualifying misrepresentations. *Id.* at 7065 n.6. In *Virgil L. Pearman*, 6 FCC Rcd 1891, 1891-92 ¶ 6 (1991), we found that this test had not been met. There, we declined to add a disqualifying issue against an applicant, holding that, even assuming that the facts warranted denying all integration credit, no showing had been made that the applicant concealed information, ignored corporate formalities, or made misrepresentations.[6] Indeed, the Board itself has recognized this distinction in past cases. *See Omaha Channel 54 Broadcasting Group Limited Partnership*, 64 RR 2d 1010, 1012 ¶ 8 (Rev. Bd. 1988); *Tequesta Television, Inc.*, 2 FCC Rcd 7324, 7325 ¶ 6 (Rev. Bd. 1987).

15. In this regard, we wish to clarify a point raised by the Board's analysis. The Board cites *Kansas Broadcast Limited Partnership*, 4 FCC Rcd 4640 (Mass Med. Bur. 1989), for the proposition that the Commission designates basic qualifications issues to determine whether an applicant's organizational structure is a "sham." 6 FCC Rcd at 5365 ¶ 11. Use of the term "sham," as in the issue designated in *Kansas*, appears to have caused some confusion. For example, in *Revision of Application for Construction Permit*, 4 FCC Rcd 3853, 3856 ¶ 21 (1989), the term "sham" is applied to situations in which an applicant's organizational structure was found unreliable and, thus, not entitled to integration credit. In *Kansas*, however, the term "sham" is used in a situation where additional questions, of a different nature, were raised: namely, whether an entity abused the Commission's processes by filing numerous applications in which it was an undisclosed real-party-in-interest. *See also Inquiry Into Alleged Abuses of the Commission's Processes*, 4 FCC Rcd 6342 (1989).

16. Upon reflection, we believe that, in view of the ambiguity and potential for confusion connected with the word "sham", its use should be avoided. It is more appropriate to analyze integration proposals under a comparative issue in terms of their overall reliability. *See Royce, supra.* For the same reasons, we see no particular benefit to be gained from use of the word "sham" in conjunction with the analysis of basic qualifying issues concerning the more fundamental concepts of misrepresentation, lack of candor, or abuse of process. (In this case, only a misrepresentation issue was specified.)[7]

17. Here, the Board's analysis fails to recognize the distinction between evaluating an applicant's organization for basic and for comparative purposes. The issue considered by the Board inquires whether "[ESI] has misrepresented facts that it is a *bona fide* two-tiered stock corporation and/or that Ms. Sondra Matthews is the real party in control of the applicant. . . ." 6 FCC Rcd at 5373 ¶ 2.[8] Yet, the Board made no findings that specific statements of material fact were deliberate misrepresentations or that ESI concealed specific information. *See Pepper Schultz*, 5 FCC Rcd 3273, 3274 ¶ 12 (1990). *See also Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 ¶ 6 (1983). To the extent that the Board discusses specific representations made by ESI, the Board does not clearly indicate more than that it finds the representations lacking in credibility. *See, e.g.*, 6 FCC Rcd at 5374 ¶ 7, 5375 ¶ 12. In

particular, the Board does not specifically find that ESI sought to conceal or misrepresent Perkinson's role in ESI. *See Bellingham Television Associates, Ltd.*, 103 FCC 2d 222, 224-228 ¶¶ 4-13 (Rev. Bd. 1986).[9] Indeed, the Board's analysis by reference to abuse of process concerns raises the question of whether it so treated ESI's proposal, although no abuse of process issue was designated. *See* 6 FCC Rcd at 5373 ¶ 3, 5375-76 ¶ 14, 5377 n.10.[10]

18. We need not reach the question of whether the Board's decision accurately reflects Commission precedent concerning the standards applicable in determining whether a proposal can be credited for comparative purposes. 6 FCC Rcd at 5373 ¶ 4, 5375 ¶ 13. *See Evergreen Broadcasting Co.*, 6 FCC Rcd 5599 (1991); *Royce International Broadcasting, supra*. As the Board correctly points out, that issue is moot. We find, rather, that the Board has not made the findings of deceptive or abusive intent necessary to sustain the conclusion that ESI committed disqualifying misconduct.

19. Our own review of the record does not disclose disqualifying misconduct under the added misrepresentation issue. The evidence concerning the participation of Matthews and Perkinson in the applicant's affairs relates to the period of time before ESI was formally incorporated. (Matthews agreed to participate in ESI in the spring of 1986; ESI was not incorporated, however, until April 1987. ESI Exh. 1 at 2-4.) Hence, this pre-formation evidence does not establish that Matthews and Perkinson knowingly disregarded the applicant's formal ownership structure, since no formal ownership structure had been established at that time.

20. We have also examined the testimony of Matthews and Perkinson concerning their roles in ESI. Without deciding what weight might be given to this testimony insofar as it attempts to show that Matthews has exercised control over the applicant, it is clear that it does not establish that the witnesses misrepresented or concealed the nature of their activities. For example, in a deposition, Matthews stated that she had not "retained" the applicant's counsel. Tr. 181, 184. Nonetheless, at the hearing, Matthews testified that she had "hired" counsel. Tr. 188. Matthews attempted to reconcile this discrepancy by drawing a distinction between the terms "retained" and "hired." She stated that she considered the term "retained" to imply negotiating a formal agreement including, for example, terms of payment. Tr. 182, 188. She admitted that she did not make such arrangements. Tr. 188-89. She further testified that the term "hired" implied only that she approved the lawyer that Perkinson recommended, which she did. Tr. 180. To the extent ESI suggests that Matthews' "hiring" of counsel substantiates her control over the applicant, this is clearly an exaggeration. On the other hand, it does not appear that Matthews attempted to deceive the Commission as to the extent of her participation. Rather, the record testimony merely expounded what she and Perkinson did, and did not, do.

21. The same can be said of other matters cited by the Board. We agree with the Board that Matthews role in dealing with the applicant's engineering consultants, securing a bank letter, obtaining a transmitter site, and arranging to repay cash advances from SCC appear largely ministerial. 6 FCC Rcd at 1357 ¶¶ 8-9, 11-12. The record does not indicate, however, that ESI knowingly attempted to deceive the Commission as to these matters. In the absence of such evidence, there is no basis to support a finding of disqualifying misconduct or to question the qualifications of ESI's principals in other proceedings in connection with this issue.

22. Because we do not agree with the Board's conclusion that ESI should be disqualified under the misrepresentation issue, the exceptions relating to the other issues in this proceeding are no longer moot. (*See* note 8, above.) We will remand this proceeding to the Board to consider these exceptions. We note that, in considering the financial issue, an initial question involves the interpretation and reconciliation of relevant Board cases. *See Mableton Broadcasting Co., Inc.*, 5 FCC Rcd 6314, 6321-22 ¶¶ 34-37 (Rev. Bd. 1990); *Scioto Broadcasters*, 5 FCC Rcd 5158, 5159-61 ¶¶ 10-13 (Rev. Bd. 1990), subsequent history omitted. We believe that it would best facilitate the orderly disposition of this matter for the Board to deal with this precedent in the context of this record in the first instance. We also note that the Board has suggested that the record may require supplementation as to this issue. 6 FCC Rcd at 5376 n.2.

IV. ORDERS

23. ACCORDINGLY, IT IS ORDERED, That the Applications for Review filed October 18, 1991 by Evansville Skywave, Inc. and the Mass Media Bureau ARE GRANTED; and the decision of the Review Board FCC 91R-81 (Sept. 18, 1991) (6 FCC Rcd 5373) IS MODIFIED to the extent indicated.

24. IT IS FURTHER ORDERED, That this proceeding IS REMANDED to the Review Board for further action consistent with this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Now pending before the Commission are: (1) applications for review filed October 18, 1991 by ESI and the Mass Media Bureau, (2) comments filed November 4, 1991 by the Bureau, and (3) an erratum filed November 14, 1991 by ESI.

[2] The Board's finding that Matthews has no broadcast experience is contradicted by the record. As ESI notes, Perkinson claimed, without elaborating, that Matthews had broadcast experience. Bureau Exh. 3 at 50. In its Integration and Diversification Statement filed November 30, 1988 at 3-4, ESI stated that Matthews hosted and co-produced a bi-monthly, half-hour talk show on WEHT-TV in Evansville and that she served as an editorial panelist on station WGBF.

[3] Additionally, the Board found that Perkinson prepared a letter for Matthews to sign in which ESI promised to reimburse SCC for funds provided to pay the attorneys and engineers. ESI eventually reimbursed SCC with funds that SCC itself contributed. The Board considered this transaction a charade. 6 FCC Rcd at 5375 ¶ 12.

[4] The Board also found that Perkinson had participated in settlement discussions and suggested that Perkinson's participation indicates that he exercised control over the applicant. 6 FCC Rcd at 5377 n.10. The record indicates that on one occa-

sion, in 1990, Perkinson met with Matthews in Indianapolis, and the two discussed settlements. Tr. 179, 231. Other than that, the record indicates that Matthews alone participated in settlement discussions without the prior agreement or approval of Perkinson. ESI Exh. 1 at 8; ESI Exh. 3 at 11.

[5] ESI also claims that it had no motive to deceive the Commission as to its organization, since it did not seek integration credit in the hearing exhibits exchanged at a point in the proceeding when at least one other comparative applicant was still pending. Earlier, however, in its Integration and Diversification Statement filed November 30, 1988 at 1-6, ESI did claim integration credit for Matthews. Thus, ESI's later abandonment of its claim of credit does not conclusively establish its motivation at the time it was formed.

[6] The addition of issues must be based on specific allegations of fact showing deceptive or abusive conduct, and not a mere claim that the applicant is undeserving of comparative credit, so that applicants have reasonable notice of what does, and does not, constitute disqualifying misconduct. *See Carmel Broadcasting Limited Partnership*, 7 FCC Rcd (1992) at ¶ 3. Taken to its extreme, the failure to define the limits of disqualifying misconduct would lead to a finding of misrepresentation or abuse of process in any case in which we rejected an applicant's claim of comparative credit. Clearly, such a result would be unsupportable.

[7] On the facts of this case, the misrepresentation issue designated by the ALJ fully and precisely delineated the essential question. Thus, in similar cases, it would be desirable for ALJs also to frame the issue in terms of misrepresentation or lack of candor. We note, however, that abuse of process may also be alleged. Abuse of process is a broad concept that includes use of a Commission process to achieve a result that the process was not intended to achieve or use of that process to subvert the purpose the process was intended to achieve. *See Broadcast Renewal Applicants*, 3 FCC Rcd 5179, 5199 n.2 (1988). Seeking to obtain a construction permit by misrepresenting or lacking candor about the applicant's ownership structure could, therefore, generally be characterized as abuse of process. However, abuse of process includes other forms of misconduct, such as filing strike applications or petitions, harassing an opponent, and filing an application for the purpose of achieving a settlement. Thus, it would be more precise to frame such an issue specifically in terms of misrepresentation or lack of candor.

[8] Because the Board disqualified ESI under this issue, it did not reach exceptions relating to three other issues that were designated -- a financial issue, a financial certification issue, and an additional misrepresentation/lack of candor issue concerning deposition testimony. 6 FCC Rcd at 5373 ¶ 2, 5376 n.2.

[9] Thus, the Board does not support its conclusion that ESI misrepresented that Matthews was ESI's sole controlling principal. 6 FCC Rcd at 5375 ¶ 14.

[10] In an adjudicatory proceeding, such as this one, the conclusion that an applicant has abused the Commission's processes must be based on more than a generalized concern that such abuse may be occurring. This is not a Rule Making proceeding, in which the Commission may act prospectively to prevent abuses by relying on its judgment based on experience, even where evidence of specific abuses is difficult to compile. *See FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 797 (1978). In an adjudicatory proceeding, a conclusion that abuse of process has occurred requires a specific finding, supported by the record, of abusive intent. *See RKO General, Inc. (WOR)*, 4 FCC Rcd 4072, 4073 ¶ 7 (1989). The record here does not support such a finding or provide a basis for a remand for further hearings on an abuse of process issue in this case. Specifically, the fact, noted by the Board, that ESI proposed a settlement agreement, involving a third-party, does not, standing alone, establish that its application was abusively filed to achieve a settlement. *See* 6 FCC Rcd at 5377 n.10.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-577

In re Applications of

NATIONAL COMMUNICATIONS INDUSTRIES	File No. BPH-870831MF
LIBERTY PRODUCTIONS, A LIMITED PARTNERSHIP	File No. BPH-870831MI
WILLSYR COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPH-870831MJ
BILTMORE FOREST BROADCASTING FM, INC.	File No. BPH-870831MK
SKYLAND BROADCASTING COMPANY	File No. BPH-870831ML
ORION COMMUNICATIONS LIMITED	File No. BPH-870831ME
HARBINGER BROADCASTING COMPANY	File No. BPH-870831MF

For a Construction Permit
For a New FM Station in
Biltmore Forest, North Carolina

MEMORANDUM OPINION AND ORDER

Adopted: February 20, 1992; Released: February 28, 1992

By the Commission:

1. In a decision released on April 8, 1991, the Review Board affirmed the ALJ's initial decision disqualifying Liberty Productions, A Limited Partnership (Liberty) and Biltmore Forest Broadcasting FM, Inc. (BFBFM) on the site availability issues, and preferring Orion Communications Limited (Orion) over Willsyr Communications Limited Partnership (Willsyr), Skyland Broadcasting Company (Skyland), Harbinger Broadcasting Company (Harbinger), and National Communications Industries (NCI) on the comparative issue. *National Communications Industries*, 6 FCC Rcd 1978 (Rev. Bd. 1991), affirming 5 FCC Rcd 2862 (ALJ 1990). In so doing, the Board awarded 100% integration credit to Orion and Harbinger, 76% credit to Skyland, 50% credit to NCI, and 20% credit at most to Willsyr, and assessed a substantial diversification demerit against Willsyr. Harbinger and NCI have not filed applications for review, and the denial of their applications on comparative grounds is therefore final.

2. Based upon the pleadings before us,[1] we affirm the Board's disqualification of Liberty and BFBFM on the site availability issues[2] and its selection of Orion on the standard comparative issue. [3] With regard to the comparative issue, we agree that Willsyr deserves 20% credit at most for the integration proposal of its 20% general partner, Sharan Harrison.[4] But we find, for the reasons set forth below, that Skyland is entitled to only 20% integration credit, rather than the 76% credit awarded by both the Board and the ALJ.

3. *Skyland's Integration:* We reduce Skyland's integration credit from 76% to 20% because the 80% equity interests of its non-voting stockholders are fully attributable under *Royce International Broadcasting*, 5 FCC Rcd 7063, 7064 ¶ 9 (1990), recon. denied, 6 FCC Rcd 2601 (1991). Organized as a two-tiered corporation, Skyland initially had eleven non-voting stockholders and three voting stockholders -- Wanda Coleman, William Ferguson, and Darcel Grimes Lloyd (7.14% equity interest each). Skyland amended its application on November 16, 1987 to reflect the changed status of William Ferguson and Darcel Grimes Lloyd from voting to non-voting stockholders, the departure of two of the original non-voting stockholders, and the acquisition by Wanda Coleman of an additional 12.86% voting stock. Thus, Skyland, with one voting stockholder (20% equity interest) and eleven non-voting stockholders (80% combined equity interests), claims 100% quantitative credit for Wanda Coleman's proposed integration as general manager.

4. The ALJ found Coleman to be a *bona fide* owner (5 FCC Rcd at 2874 ¶ 154), but he awarded Skyland only 76% credit because three of Skyland's non-voting stockholders (8% equity interest each) are members of the law firm that has served as local counsel since Skyland's inception (*Id.* at ¶¶ 156-60). (The combined 24% held by the three non-voting stockholders was subtracted from the 100% that Skyland claims to yield 76% integration credit.) Under these circumstances, the ALJ determined that these stockholders had not sufficiently insulated themselves from Skyland's operations to qualify as passive investors, and that their combined 24% ownership interests must therefore be attributed to Skyland for integration purposes (*Id.* at 2874-75 ¶ 161). This reduced Skyland's integration credit from 100% to 76%.

5. Citing *Coast TV*, 5 FCC Rcd 2751, 2753 (1990), the Review Board affirmed the award of only 76% quantitative integration credit for Skyland's proposal (6 FCC Rcd at 1980-81 ¶ 17). It agreed that the three non-voting stockholders could not be considered passive for integration purposes given their affiliation with the law firm retained as Skyland's local counsel, and that attribution of their equity interests was therefore required (*Id.*). It also noted that the law firm's senior partner (and 8% non-voting stockholder in Skyland) was a prime mover behind Skyland's application, that he had taken a lead in recruiting the others, and that he had rejected the advice of

Skyland's communications counsel, who suggested that the non-voting stockholders' law firm not continue serving as corporate counsel for the applicant (Id. at 1981 ¶ 18). Thus, it found that "the totality of the factual record and controlling Commission precedent" supported the ALJ's attribution decision.

6. We agree that Wanda Coleman is a *bona fide* owner entitled to comparative credit for her proposed integration. The post-formation record affirmatively establishes that, in accordance with her formal designation as a voting stockholder, Ms. Coleman has acted independently of the non-voting stockholders since Skyland's formation as a two-tiered corporation,[5] and that she can be expected to continue exercising managerial authority in the future. Under these circumstances, the pre-formation activities of the non-voting stockholders are not probative of whether Wanda Coleman is a *bonafide* owner entrusted with managerial authority in the future. *See Evergreen Broadcasting Company*, 6 FCC Rcd 5599, 5601 ¶¶ 14-16 (1991). However, only partial credit is due for Skyland's proposal because it has not established that she will have *exclusive* control over the management of the proposed station, as is necessary for the 100% integration credit that Skyland claims. As the Board found, at least three of the non-voting stockholders belong to the law firm that has served as Skyland's corporate counsel since its inception. Not only did these services continue after Skyland's organization as a two-tiered corporation (and the designation of these stockholders as non-voting owners), but Skyland -- at the express urging of non-voting stockholder, Melvin Watt -- ignored the advice of its FCC counsel that such services should cease.[6]

7. Such activities require attribution of the equity interests held by those three non-voting stockholders. *See Magdalene Gunden Partnership*, 5 FCC Rcd 2509 (1990), reaffirmed on remand, 6 FCC Rcd 5976, 5977 ¶ 11 (1991), in which the Commission held that an owner who provides legal services that materially relate to the applicant's media activities may not be deemed passive for integration purposes. *See* also *Clarification of Ownership Attribution*, 1 FCC Rcd 802, 804 (1986). In attributing these interests, we reject Skyland's contention that attribution is unwarranted because these owners provided only routine legal services and the applicant had retained separate communications counsel to represent it before the Commission.[7] Notwithstanding Skyland's attempt to characterize these legal services as unrelated to the prosecution of its application, Skyland does not claim to have any business enterprise other than its bid for the Biltmore Forest license and, accordingly, the legal services at issue necessarily relate materially to the applicant's media activities.[8]

8. As the law firm of Skyland's three non-voting stockholders continued to provide legal services even after its organization as a two-tiered corporation and the designation of these three owners as non-voting stockholders, their 24% equity interests are fully attributable under *Magdalene Gunden Partnership*. The equity interests held by the other eight non-voting stockholders are also attributable under *Royce*, 5 FCC Rcd at 7064 ¶ 9, which requires the attribution of *all* passive interests once any purportedly passive owner has engaged in conduct belying his formal designation as a limited partner or non-voting stockholder. As we explained in *Royce*, once an applicant ignores the active-passive distinction with respect to one so-called passive owner, we have no assurance that it will adhere to its organizational structure in the future, or that its two-tiered arrangement is reliable.

9. As the provision of legal services by the non-voting stockholders and by their law firm warrants attribution of all passive interests, we do not rely on the non-legal activities cited by the Board (6 FCC Rcd at 1981 ¶ 18) to support our attribution decision. As explained in paragraph 6 above, the non-voting stockholders' pre-formation activities are not a basis for totally discrediting Skyland's integration proposal inasmuch as the post-formation record conclusively demonstrates the reliability of Coleman's designation as a voting stockholder. But by virtue of the legal services -- which continued after the amendment designating these owners as non-voting stockholders -- attribution of the 80% combined equity interests of all the so-called non-voting stockholders is mandated by *Anax* and *Royce* ¶ 9. Thus, Skyland is entitled to only 20% quantitative credit for the integration of it sole voting stockholder, Wanda Coleman.

10. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 C.F.R. § 1.115(g) of the Commission's rules, the applications for review filed on May 9, 1991, by Skyland Broadcasting Company, Liberty Productions, Inc., Willsyr Communications Limited Partnership, and Biltmore Forest Broadcasting FM, Inc. ARE DENIED; and that the Board's Decision in *National Communications Industries*, 6 FCC Rcd 1978 (Rev. Bd. 1991) IS MODIFIED, as reflected herein.

11. IT IS FURTHER ORDERED, That the Motion to Accept Supplement to Application for Review, filed July 10, 1991, by Skyland IS GRANTED, and the Supplement to Application for Review, filed July 10, 1991, by Skyland IS ACCEPTED; and that the Motion to Strike Opposition, filed July 26, 1991, by Skyland IS GRANTED and the Opposition to Motion to Accept Supplement, filed July 22, 1991, by Orion IS REJECTED.[9]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Now before the Commission are: (a) Applications for Review, filed May 9, 1991, by Skyland, Willsyr, Liberty, and BFBF; (b) an Erratum to Application for Review, filed May 13, 1991, by Skyland; (c) an Opposition, filed May 24, 1991, by Skyland; (d) a Consolidated Opposition, filed May 24, 1991, by Willsyr; (e) an Opposition, filed May 23, 1991, by Orion; (f) Supplement to Application for Review and Motion to Accept Supplement, filed July 10, 1991, by Skyland; (g) Oppositions to Motion to Accept Supplement, filed on July 19, 1991, by Willsyr and on July 22, 1991, by Orion; and (h) Motion to Strike Orion's Opposition to Motion to Accept, filed July 26, 1991, by Skyland.

[2] BFBFM's transmitter site was sold on October 9, 1987, less than two months after it certified that it had a site. Although BFBFM admits learning of the sale in the summer of 1988, it did not seek to amend to a new site until March 20, 1989. Given this delay of at least six months, the March 20, 1989 amendment was properly rejected. To the extent that BFBFM claims to have

an option to lease the site that binds the new owner, BFBFM appears to have nothing more than a letter of reasonable assurance from the original owner for which it paid $2,000. BFBFM Exhibit No. 4, Attachment A. Moreover, notwithstanding its claim to have a legally enforceable option, BFBFM did not record the option or take any legal action against either owner of the site. Under these circumstances, BFBFM was not entitled to wait until the new owner affirmatively notified it that the site was now unavailable before amending to a new site. In any event, BFBFM -- which proposes only 15% integration and has other media interests -- could not prevail under the comparative issue.

[3] All three of Orion's stockholders -- Zebulon Lee (40% equity interest), Betty Lee (30% equity interest), and Brian Lee (30% equity interest) -- propose to be fully integrated. Several applicants challenge the award of integration credit for Betty Lee's proposed integration as full-time Director of Public Affairs Programming, but they do not challenge the integration proposals of Zebulon and Brian Lee. We agree with the Board that Betty Lee's proposed position as Director of Public Affairs and Public Service entails sufficient managerial responsibility to qualify for integration credit. Nor will we discredit that proposal because Betty Lee played a less significant role in prosecuting Orion's application than did the other two stockholders. Even if awarded only 70% integration credit for Zebulon Lee and Brian Lee, Orion would prevail on quantitative grounds for the reasons set forth below.

[4] Citing *Victory Media, Inc.*, 3 FCC Rcd 2073 (1988), Willsyr faults the Board for relying on the pre-formation activities of its 26.67% limited partner, William Eaton. However, *Victory* was expressly overruled by *Coast TV*, 5 FCC Rcd 2751, 2753 (1990). *See Magdalene Gunden Partnership*, 6 FCC Rcd 5976, 5977 ¶¶ 9-11 (1991). In any event, the Commission has confirmed the relevance of pre- formation activities in assessing the reliability of an integration proposal where the post-formation record does not conclusively demonstrate that the nominal owners will exercise managerial authority. *Evergreen Broadcasting Co.*, 6 FCC Rcd 5599, 5601 ¶¶ 14-16 (1991). As William Eaton has disregarded the applicant's organization as a limited partnership, the interests of the other two 26.67% limited partners are likewise attributable under *Royce International Broadcasting*, 6 FCC Rcd 7063, 7064 ¶ 9 (1990). Willsyr cannot prevail with only 20% credit for Harrison's proposed integration. Thus, we need not determine whether the ALJ was correct in discrediting totally Willsyr's integration proposal.

[5] From the start, Ms. Coleman independently handled the corporation's financial matters. Thus, for example, she has exclusive discretion to decide when to make capital calls (Tr. 2023), she makes all such calls (Tr. 2022, 2266-67), and she receives and pays all of Skyland's bills (Tr. 2023). Although Wanda Coleman received part of her 20% stock for services and part for cash, she must contribute her full 20% share of future capital calls (Tr. 2019-22; Skyland Ex. 1, at 3). She also handled the essentially ministerial tasks of arranging for the publication of local notice (Tr. 1801) and supplying the EEO information included on the application (Tr. 1796, 1798-1800, 2107-08).

[6] *See* generally, *Las Americas Communications, Inc.*, 6 FCC Rcd 1507, 1511 ¶¶ 31-35 & n.29 (1991), where the Commission attributed the interests of non-voting stockholders based on record evidence that they were active before the applicant's formation and that they continued to have an active role in corporate affairs (that is, they played a central role in financial and legal matters affecting the application) even after an amendment designating them as non-voting stockholders.

[7] Skyland submits that no Commission case mandates attribution under the facts of this case. That we have never before faced the precise fact situation raised here does not bar us from determining that this type of legal representation accords these owners authority to control the licensee that requires the attribution of their interests under *Anax*. *See Evergreen Broadcasting Co.*, 6 FCC Rcd at 5600 ¶¶ 7-10. Indeed, Skyland cites no precedent where the Commission has declined to attribute an ownership interest based on the type of legal representation provided.

[8] In this regard, we have indicated that "it would be impossible to envision legal services that are more directly related to [the entity's] media activities . . . than those *concerning the licensing and operation of broadcast entities*." *Clarification*, 1 FCC Rcd at 804 ¶ 15 (emphasis added). To the extent that *Victory*, 3 FCC Rcd at 2074 ¶ 9 (1988), could be read otherwise, it has been overruled. *Magdalene Gunden Partnership*, 6 FCC Rcd at 5977 ¶¶ 9-11.

[9] As Skyland alleges, the deadline for opposing its Motion to Supplement was July 19, 1991. *See* 47 C.F.R. § 1.294(b) of the Commission rules. Orion's July 22, 1991 Opposition is therefore untimely. Orion has not demonstrated good cause for the delay, requested that we accept the late-filed pleading, or asked for an extension of time in which to submit its Opposition. Under these circumstances, we reject the untimely pleading. *See* 47 C.F.R. § 1.46(a) of the Commission rules providing that motions for extensions of time shall not be routinely granted; *Proposals to Reform the Commission's Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157, 192 n.34 recon. granted in part, 6 FCC Rcd 3403 (1991), indicating that motions for extensions of time should be examined closely to determine whether they are supported by good cause.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI Telecommunications Corporation Tariff F.C.C. No. 1 — Transmittal No. 653

ORDER

Adopted: February 14, 1992; Released: February 14, 1992

By the Chief, Common Carrier Bureau:

1. On January 31, 1992, MCI Telecommunications Corporation (MCI) filed the captioned tariff revisions which introduce a "SureSave" discount plan. This plan includes a "Card Option" that combines discounts on both "1+" and calling card usage on calls placed using an MCI calling card but not a card issued by a local exchange carrier.

2. On February 7, 1992, American Telephone and Telegraph Company (AT&T) filed a "Conditional Petition to Suspend and Investigate." AT&T requests that we suspend and investigate the captioned transmittal "to the extent it raises the same issue designated for investigation in the Bureau's Investigation Order regarding AT&T's Transmittal Nos. 3380, 3537, 3542 and 3543." AT&T Conditional Petition at 3.

3. We deny AT&T's Conditional Petition. The Commission's Rules require that a petition seeking suspension of a tariff filing of a nondominant carrier must show:

> (A) That there is a high probability the tariff would be found unlawful after investigation;
>
> (B) That the harm alleged to competition would be more substantial than the injury to the public arising from the unavailability of the service pursuant to the rates and conditions proposed in the tariff filing;
>
> (C) That irreparable injury will result if the tariff filing is not suspended; and
>
> (D) That the suspension would not otherwise be contrary to the public interest.

47 C.F.R. § 1.773(a)(ii). AT&T has not even attempted to make the required showing. AT&T's Conditional Petition must therefore be denied.

4. Accordingly, IT IS ORDERED that the Conditional Petition to Suspend and Investigate MCI Telecommunications Corporation, Tariff F.C.C. No. 1, Transmittal 653, filed by American Telephone and Telegraph Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Vista Telephone Companies	Transmittal Nos. 5 and 6

Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: February 14, 1992; Released: February 14, 1992

By the Chief, Common Carrier Bureau:

1. On December 20, 1991, the Vista Telephone Companies (Vista Telephone Company of Iowa and Vista Telephone Company of Minnesota, hereinafter Vista) filed Transmittal No. 5 to introduce generally tariffed rates for 9.6 kilobit per second (kbps) Digital Data Service (DDS). Currently, Vista offers 9.6 kbps DDS on an individual case basis. Transmittal 5 is scheduled to become effective on February 18, 1992.

2. On January 7, 1992, MCI Telecommunications Corporation (MCI) filed a petition to suspend and investigate Transmittal 5. MCI argues that Vista's rates for 9.6 kbps DDS are not cost-based because these rates are higher than the rates for Vista's 56 kbps DDS. MCI contends that the higher bandwidth service should cost more than the lower bandwidth service. MCI Petition at 2-3. MCI asserts that Vista also violates the Commission's strategic pricing guidelines by setting rates for 9.6 kbps service higher than the rates for 56 kbps service. *Id.* [1] Finally, MCI insists that even if a customer needed only 9.6 kbps of bandwidth, it would order the lower priced 56 kbps circuit, resulting in wasted bandwidth and inefficient use of Vista's network. *Id.* at 4.

3. On January 13, 1992, Vista replied to MCI. In its original rate calculations for 9.6 kbps DDS, Vista concedes it inadvertently included the cost of certain equipment used to terminate data transmission facilities at a customer's premises. This error resulted in overstated channel termination charges for the service, causing 9.6 kbps rates to be higher than the 56 kbps rates. Vista Reply at 2. Vista reported that it would remove the cost of the equipment and revise its channel termination charge accordingly. [2] Vista states that the revised monthly channel termination charges for 9.6 kbps DDS are comparable to the corresponding charges for 56 kbps service and, overall, 9.6 kbps DDS will be priced slightly lower than 56 kbps DDS. *Id.* at 2-3. The revised rates, says Vista, will ensure that a customer will order only the specific service it needs, thus alleviating concern about inefficient use of the network. *Id.* at 4. Finally, Vista argues that the strategic pricing guidelines are not relevant since its revised rates for 9.6 kbps DDS are costbased and now comparable to the rates for 56 kbps DDS. *Id.* at 3.

4. The Common Carrier Bureau has reviewed Vista's Transmittal Nos. 5 and 6, the petition filed by MCI, and Vista's reply to that petition. We conclude that no investigation is warranted at this time.

5. Accordingly, IT IS ORDERED that the petition to suspend and investigate Vista Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 5, filed by MCI Telecommunications Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

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[1] *Citing* Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, 5 FCC Rcd 400, 401 (1990).

[2] On January 24, 1992, Vista filed Transmittal No. 6 to make these rate revisions.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-373

In the Matter of

Pilgrim Telephone, Inc.

ORDER

Adopted: February 19, 1992; Released: February 20, 1992

By the Deputy Chief, Common Carrier Bureau:

1. On December 23, 1991, we issued an order in the captioned proceeding directing Pilgrim Telephone, Inc. (Pilgrim) to demonstrate that its rates are just and reasonable, or reduce its rates to a just and reasonable level, and to announce, at the beginning of each call that it handles, that its rates are available on request. [1] We issued this order pursuant to our authority to review the rates of interstate providers of operator services (OSPs) under the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA).[2]

2. On January 28, 1992, Pilgrim filed a pleading requesting that we terminate the captioned proceeding. Pilgrim argues that it is not an OSP and thus is not subject to our jurisdiction under TOCSIA. In order to have sufficient time to address the issues raised by Pilgrim's pleading, we extended the deadline by which Pilgrim must comply with our Order from February 6, 1992 to February 20, 1992. [3] We now further extend the deadline by which Pilgrim must comply with our Order from February 20, 1992 to March 5, 1992. [4]

3. Accordingly, IT IS ORDERED that the effective date of the requirements that Pilgrim Telephone, Inc. demonstrate that its rates are just and reasonable, and begin announcing, at the beginning of each call that it handles, that its rates are available on request IS EXTENDED until March 5, 1992.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

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[1] Pilgrim Telephone, Inc., CC Docket No. 91-373, DA 91-1608, released Dec. 23, 1991 (Com.Car.Bur.)

[2] TOCSIA is codified as Section 226 of the Communications Act, 47 U.S.C. § 226.

[3] Pilgrim Telephone Inc., CC Docket No. 91-373, DA 92-163, released Feb. 6, 1992 (Com.Car.Bur.).

[4] We will address the merits of Pilgrim's petition at a later date.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
February 24, 1992

Released: February 28, 1992

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Agape Broadcasting Foundation, Inc. 8310-MD 91070217
Licensee, Noncommercial
Radio Station KNON(FM)
4415 San Jacinto
Dallas, TX 75204

Attention: Arquilla Smith, Vice President

Dear Licensee:

This letter constitutes a Notice of Apparent Liability for a forfeiture of Five Thousand Dollars ($5,000), for violations of Section 399B of the Communications Act of 1934, as amended. This notice is issued pursuant to Section 503(b) of the Communications Act, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules.

Section 399B of the Communications Act prohibits public broadcast stations from broadcasting advertisements. It defines an advertisement as:

> any message or other programming material which is broadcast or otherwise transmitted in exchange for any remuneration, and which is intended... to promote any service, facility, or product offered by any person who is engaged in such offering for profit....

47 U.S.C. § 399b. *See also* 47 C.F.R. § 73.503; and April 14, 1986, *Public Notice*.

Because of complaints indicating that KNON(FM), Dallas, TX, might have violated Section 399B of the Communications Act of 1934, as amended, and related Commission rules and policies, the Mass Media Bureau's Enforcement Division sent you a letter of inquiry dated July 8, 1991. The letter sought specific information concerning underwriting announcements apparently aired on March 28-29 and May 24-25, 1991. (Transcripts attached.) You were also asked to supply certain information about KNON's arrangements to broadcast programming "produced... or furnished by persons other than the licensee," as regulated by Section 73.503(c) of the Commission's rules.

By answer dated August 6, 1991, you conceded that "there were problems" in some of the March 1991 underwriting announcements, primarily during programming produced by Tejano Media Group (TMG). Pursuant to your contract with that organization, TMG was authorized to program 15 hours a week with hispanic music and to underwrite or seek underwriting support for the show. You state that you had reviewed the underwriting and other FCC rules and policies with TMG and believed, based on your experience in prior dealings with TMG principals and on their explicit representation in the TMG contract, that FCC rules would be followed. You explain that you "closely, but informally," monitored the TMG broadcasts, and upon discovering questionable TMG underwriting announcements you took corrective actions, including meeting with TMG (during the week of April 8, 1991) to discuss and resolve the problems, making KNON staff available to assist TMG in underwriting matters, and seeking further guidance on these issues by speaking with Dallas-based FCC staff early in June. After receiving our letter of inquiry in July, you say you took more drastic actions, not only reviewing all TMG announcements being aired but also requiring pre-approval by KNON staff.

You claim that the May 24-25 announcements were aired during the Topacio show and that they were not authorized by KNON staff. The Topacio music club, you explain, was to underwrite and broadcast musical programming from noon to 2 p.m. on Saturdays (beginning March 2, 1991) and had represented to KNON that no other underwriters were involved with that programming. You state that you terminated your relationship with Topacio on July 6, 1991.

You state that after receiving our letter of inquiry, you made the necessary revisions to correct announcements being aired, instituted a prior approval policy for all underwriting announcements, and hired a part-time employee to "supervise and monitor all underwriting announcements, copy and production." These measures, you claim, will prevent future underwriting transgressions.

The Commission, however, has received information indicating that, despite your assurances to the contrary, KNON continued to broadcast announcements that appear to be prohibited by Section 399B. (See August 13, 1991, transcript, attached.) While you have pointed out specific changes and improvements in KNON underwriting announcements since our investigation began, it appears that promotional language has not been eradicated, and that your corrective measures and policies have been inadequate.

Based on the evidence before us, it appears that you have violated Section 399B of the Communications Act and related Commission rules and policies concerning the broadcast of advertisements by noncommercial educational stations. The subject underwriting announcements, all aired in exchange for remuneration, contain language promoting the services, facilities, or products offered by persons engaged in such offering for profit. The announcements do not merely identify the underwriter; rather, they contain qualitative and comparative terms, "calls to action," price information, and other inducements for listeners to patronize the commercial entities named.

Accordingly, you are hereby advised of your apparent liability for a total forfeiture of $5,000 for your apparent repeated violations of Section 399B of Communications Act, in the manner specified above, on March 28-29, May 24-25, and August 13, 1991. This amount was reached after consideration of the factors set forth in Section 503(b)(2) of the Act and the guidelines described in our recently adopted *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. pending*. Under

these standards, $2,500 is the base forfeiture for violation of underwriting limitations by noncommercial stations. That figure was increased to reflect the fact that the violations were repeated.

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. § 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

Sincerely,

Roy J. Stewart
Chief, Mass Media Bureau

ATTACHMENTS

KNON(FM), March 28-29, 1991

1. *Casa Jose* -- Just like mom used to make it. Casa Jose has the Mexican plates like steak ranchero, real tender strips... tan pequeno marinated in our special sauce grilled with bell pepper and fresh jalapeno strips, and yes, of course, they make their home-made tortillas...

2. *Duncanville Discount Tires* --... specializes in new and quality tires for passenger cars, sports cars, (etc.)....

3. *Steve's Pawn Shop* -- Hey--yeah, you--find yourself short of money, no credit at the bank, everybody turning you down for a loan? Feeling lost? Well, Here's Steve, what? Here's Steve... Steve who? Steve's Pawn Shop and Jewelry, that's right... Steve's Pawn Shop and Jewelry will loan you money on items such as gold, jewelry, (etc.), any item of worth....

4. *Amigo Custom Paint and Body Shop* --... Amigo Custom Paint and Body... Yes, of course, to serve you... they have free estimates, insurance claims are welcome...

5. *The Monopoly* --... Everyone in the metrolex knows where downtown Dallas is... and of course everyone knows where The Monopoly is... but some may ask, what is The Monopoly? Well, the Monopoly is the disco that guarantees you lots of fun every weekend Friday from 8 p.m. to 3 a.m., Saturday, from 8 p.m. to 4 a.m. ... free entry from 8-10... and also the fun is there until 2 p.m. ... But the important thing is that you came and find out for yourself what real fun is... or ask the managers Pepe and Hector Hinojosa what is going on, every weekend at The Monopoly. Yes, The Monopoly is the grand show! show! show!

The Monopoly Show... Now your guaranteed fun is at The Monopoly. Yes, have fun dancing salsa, merengue, cumbia, balada, disco, (etc.)... Sundays free entry from 8-10... now there is an excuse to go and have fun. ...

6. *Restaurante Santana* --... If you want to eat something delicious, 100% Mexican, Restaurante Santana has the best... house specialty... try it and delight yourself with the excellent food....

7. *Stolar Chiropractic Clinic* --... Life can be full of pain... the doctors at Stolar Chiropractic Clinic want you to feel healthy again. They are specialists at neck, head, back, arm and leg pains.... If you are hurt in an auto accident or at work and you don't know why you are feeling pain, the doctors at Stolar Chiropractic Clinic can help you today. Free consultations to everyone... you do not have to live with pain any more. Stolar Chriopractic are here so you can feel like new again... Stolar Chiropractic Clinic, to make you feel new again.

8. *Amador Insurance* --... has served the Dallas and Ft. Worth community for 20 years... specialize in Forms SR202, Suspended License. They can help you real fast without having to do the job twice. ... Don't forget to call Amador Insurance for your auto insurance and to get to know the best prices.

KNON(FM), May 24-25, 1991

1. *La Cronica* -- ... for special events call us at 363-7936, The Cronica Newspaper.

2. *Mexico Studio* -- ... Mexico Studio is the answer... capture those important moments, weddings, (etc.)... Prepare yourself for a photograph session, and you can look like a model... Our make-up artist will make you like a model, and your pictures will be the most beautiful memory of this great experience... call and ask for more information as soon as possible... photography by excellence...

3. *Topacio* -- The excitement continues here at Topacio's... every Saturday, bringing you music and more music... Today, Saturday, ... things are going to be great at your favorite club located at... The good times and good music continue...

Topacio offers you great music every Friday with the group Carabali and their new singer... We don't want to tell much, so you can go listen and see for yourself next Friday... Last night it was splended with their new singer directly from Lima, Peru. Now the Carabali group has a new singer and they have had a great change, that has been very well accepted by the public, and the group sounds great, so don't miss it next Friday.

Their new singer... we don't want to tell his name, we'll just tell you he's from Lima, Peru, so you can come and see him and decide if you like him... The excitement and music continue here at Topacio...

4. *Ovalles Garage* --... If your car is not working, or has problems, don't put up with it, Ovalles Garage will solve your problem... They will give the service you deserve.

5. *Joyeria Jailara* -- Jewelry Store Jailara offers you a great selection of 10 and 14-karat gold... Saturday is savings day, buy in cash, prices are slashed. Visit us and you will be persuaded that we have low prices on all our merchandise. Don't buy expensive things, come see us and save.... Saturdays are opportunity days.... Easy credit.... Call us at 943-1149.

6. *Casa Jose Mora* -- ... Jose Mora of Casa Mora in Arlington takes special care in preparing authentic Mexican Food... They specialize in tacos, those breakfast tacos, they are done so well....

7. *La Bamba* -- This is Simon the Diamond Molina for La Bamba... Tonight is fiesta party at La Bamba, ladies and gentleman, the first 300 people at the door are free before 11 p.m. The first 300 people win a free cellular phone. Join us for the hot legs contest, win $100 in cash...

Tonight Fiesta. La Bamba serves free drinks for everyone before 11 p.m. ... We'll see you at La Bamba at 3500 McKinney and Lemon... free cover before 11 p.m. Let's do it.

8. *Amigos Custom Paint and Body* -- Amigo Custom Paint and Body features complete detailed work for your car or truck... Amigo, Amigo, Amigo, Amigo Custom Paint and Body specializes in jobs like radiant colors, those beautiful candy colors also, free hand striping done....

9. *Promociones Monterey* --... pleased to present this Saturday, June 8, at the Auto Auditorium in Fair Park, the number one group in Mexico, Los Bukis! Yes, this Saturday, June 8, Los Bukis! Also presenting ... Obtain your pre-sale tickets at Taqueria Tepatitlan, Chango Botanica, Taqueria Lupita, (etc.)... We'll see you this Saturday at the Auto Coliseum in Fair Park.

10. *Rosana's Weddings* --... Rosana's Weddings, your special shop for brides or quinceaneras....

11. *NAC Glass and Mirror* --... with years of quality professional guaranteed service in both commercial and residential... when you need to replace glass on your car or your truck, trust it to professionals like NAC Glass and Mirror.... Next time someone breaks your window in your business, your home or your car, NAC Glass and Mirror....

12. *Lipshi Motor Cars* -- Remember I told you, if you are looking for a good used automobile, Lipshi Motor Cars... used to be a Porsche Auto place ... no credit, bad credit, cars from $2,000 to $100,000... Tell them Simon the Diamond sent you, and right now their phone number is....

13. *La Bamba* -- Tina Evet, live in concert the first time in Dallas, from New York City, New York... Jone us for Coro... live on stage with all his dancers... I would like to invite all the beautiful girls to La Bamba this Saturday...

KNON(FM), August 13, 1991

1. Sensational dance this Friday at the Guys and Dolls.... International Promotions present this great dance with "Los Baron de Apodaca" .... Also presenting "Tropical Florida" strong hits this Friday with "Tropical Florida," also the music of "Los Vencedores de China Nuevo Leon. " Obtain your tickets pre-sell in Ft. Worth.... We'll see you this Friday. [Translated from Spanish.]

2. Ladies and Gentlemen, the Hi Ho Ballroom... proudly presents Saturday, August 17, the return by popular demand, straight from the recordsetting concert in Houston, world famous "The Summit".... Live at Grand Prairies Hi Ho Ballroom, the largest Hispanic traveling road show.... Internationally known with two gold albums.... Ladies and gentlemen, your MC from La Caliente de Dallas, Simon the Diamond Molina.

3. This coming Thursday, ... the world premiere of the video "El Sancho." ... This Thursday come with us and be the first person on your block to see the world premiere video "El Sancho. "... The world premiere of "El Sancho" video this Thursday at The Monopoly, 609 North Hardwood.... [Spanish and English.]

4. Arlington's best Mex-Mex... Have you ever been to Mexico? Well, have you at least enjoyed great honest Mexican food, in Arlington? The answer is probably no, unless you have eaten at one of the most overlooked restaurants in town. We are speaking about Casa Jose in Arlington. Casa Jose, 2030 South Cooper Street, at Pioneer Parkway.... They... serve all your favorites, but let me tell you, still, in a town where you pay more at other places and you get less quality, it is a pleasure for me to recommend Casa Jose in Arlington. My friends, you will see the difference. Casa Jose in Arlington.... There you will be served the best. And don't forget their outdoor cantina and patio. It's simple, check them out. You'll be glad you did. [Spanish and English.]

5. If you are tired of those factory food fast burgers, then I've got a place for you. The Feedbag has been cooking great food for over 15 years, and if you haven't tried one of their burgers, well, you are really missing out on something special. The Feedbag hamburger is hand-pattied and cooked to your order. They use only the freshest ingredients and each burger is cooked just the way you like it.... In addition to terrific food, you'll love the great atmosphere at the Feedbag. They have television, video games, and a great patio that's perfect for outside dining. The Feedbag also has some great prices on longnecks and buckets of beer. Whatever your pleasure, the Feedbag makes you feel at home. So why settle for less, when the Feedbag offers so much more?

Before the
Federal Communications Commission
Washington D.C. 20554

In the Matter of

Cincinnati Bell Telephone Company
Revisions to Tariff F.C.C. No. 35

Transmittal No. 603

ORDER

Adopted: February 24, 1992; Released: February 24, 1992

By the Chief, Common Carrier Bureau:

1. Cincinnati Bell Telephone Company (CBT) has filed Transmittal No. 603 to modify its access tariff. In this filing, CBT introduces "Common Channel Signalling Access Capability" (CCSAC) as a nonchargeable, optional feature which is available in conjunction with Feature Group D (FGD) Switched Access Service. The CCSAC optional feature provides access to CBT's common channel signalling network to facilitate call set-up based on Signalling System 7 technology, the standardized protocol for transport of signalling information out-of-band. This transmittal also introduces service arrangement charges, which fall into two categories: (1) nonrecurring installation charges for new FGD trunks ordered with the CCSAC option; (2) nonrecurring rearrangement charges for conversion of existing FGD trunks from multifrequency signalling to CCSAC. Transmittal 603 is scheduled to take effect on February 25, 1992.

2. MCI Telecommunications Corporation (MCI) filed a petition to suspend and investigate CBT Transmittal No. 603 on December 23, 1991. CBT filed a reply on January 8, 1992.

3. MCI argues that CBT has filed unreasonably high nonrecurring charges for the conversion of existing FGD trunks from multifrequency addressing to the CCSAC signalling option. MCI Petition at 2. MCI further complains that NYNEX's two operating companies, New York Telephone (NYT) and New England Telephone (NET) are the only local exchange carriers (LECs) besides CBT to file specific CCSAC rearrangement charges. *Id.* MCI asserts that the large differences in the labor time estimates of the CBT and NYNEX cost studies are the primary reason for the rate variance between NYNEX and CBT. *Id.* at 2-3.

4. MCI also alleges that CBT's weighted-average labor rates for CCSAC nonrecurring charges, which are 10.9 percent higher than the rates for NYT, are particularly surprising considering that the state of New York's average salary in 1989 was 21.2 percent higher than the average annual salary in Cincinnati. *Id.* at 3. MCI charges that the reason for these results is that while NYT and NET use current labor rates in their cost studies, CBT uses an inflated future labor rate. *Id.* at 3-4, citing CBT Transmittal No. 603 Description and Justification, Workpaper A. MCI insists that the use of a future labor rate is especially inappropriate considering the nature of the service since rearrangements are for the conversion of an existing service and most, if not all, demand for rearrangements will come at the beginning of the demand period. *Id.* at 4.

5. Finally, MCI argues that CBT's rearrangement charges are also unreasonable in comparison to other LECs. *Id.* at 4-5. Specifically, MCI charges that while the revenues earned by other LECs range from $0.00 to $7,323.25, CBT plans to assess its customers $135,231.50. *Id.* at 5.

6. CBT replies that MCI's analysis of labor time estimates is misleading in that MCI selectively focuses on the total number of minutes required for the first trunk conversion, rather than focusing on the number of trunk conversions in a typical service order, which is 24. CBT Reply at 3. CBT asserts that the estimates for the conversion of 24 trunks demonstrates that CBT's labor time estimates are reasonable and in fact less than the estimates of NYT and NET for the same number of trunk conversions. *Id.*

7. In response to MCI's claims that CBT's labor costs are unreasonably high, CBT replies that MCI's charge is unfounded and based upon a flawed analysis of CBT's rate development process. *Id.* at 3-4. CBT further argues that MCI's claim that CBT's labor rate is speculative because it is inflated up to the mid-point of the period beginning January 1, 1992 and ending June 30, 1993, is without merit. *Id.* at 5. Further, claims CBT, contrary to MCI's assertion that virtually all demand for CCSAC will occur during the initial demand period, trunk conversions can only occur after CBT's end offices are equipped with the necessary hardware and software to support CCSAC options. Therefore, says CBT, CBT's estimate that CCSAC trunk conversions will take place throughout the tariff period is properly based. *Id.* Finally, CBT asserts that its nonrecurring charges are just and reasonable because the charges are based on a more realistic number of trunk conversions than MCI has chosen to employ in its petition. *Id.* at 5-6.

8. The Common Carrier Bureau has reviewed CBT Transmittal No. 603, the petition filed by MCI, and CBT's reply. We conclude that an investigation is not warranted at this time.

9. Accordingly, IT IS ORDERED that the petition to suspend and investigate, Cincinnati Bell Telephone Company Tariff F.C.C. No. 35, Transmittal No. 603 filed by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SATELLITE TRANSMISSION AND RECEPTION SPECIALIST COMPANY — File No. ITC-91-197-TC

Application for Authority Under Section 214 of the Communications Act To Transfer Control of Title II Authorizations

MEMORANDUM OPINION, AND ORDER

Adopted: February 20, 1992; Released: February 28, 1992

By the Chief, International Facilities Division:

1. On August 21, 1991, Satellite Transmission and Reception Specialist Company, (STARS), filed an application requesting authority to transfer control of STARS and its Title II Section 214 international authorizations to TeleColumbus USA, Inc. (TC-USA).[1] No Title III authorizations are involved. The application was placed on public notice on August 28, 1991; no comments were received.

2. STARS states that it is a wholly-owned susidiary of Houston International Teleport, Inc. (HIT), a holding company. HIT is a closely-held non-public company which, at the time the instant application was filed, no individual shareholder owned more than 50% of the common stock with voting rights. The only HIT shareholders owning more than seven percent ownership interests are David G. Olson, the founding shareholder and Chief Executive Officer of both HIT and STARS--24.39%; TC-USA, 21.87%; and Metropolitan Life Insurance Company (Met Life)--12.06%.[2] TC-USA purchased an additional 28.39% interest in HIT from Kenneth Schnitzer, Sr. and family and simultaneously created a voting trust for those shares appointing Mr. Olson as trustee. [3]

3. STARS states that TC-USA has been a HIT shareholder since TC-USA was established in 1988. TC-USA acquired most of its shares in HIT from its parent, TeleColumbus AG of Switzerland, and later purchased additional stock from other HIT shareholders. TeleColumbus AG, is a Swiss corporation which provides database retrieval services and cable television services in Europe. TC-USA also owns World Communications, Inc. (WorldCom), an FCC authorized international telecommunications carrier, which is not in direct competition with STARS.

4. The applicant asserts that TC-USA wishes to buy shares available from smaller stockholders if prices can be mutually agreed upon. Therefore, STARS states that there is a substantial likelihood that TC-USA's HIT shareholdings could exceed 50% which would vest voting control in TC-USA.[4]

5. STARS further states that the transfer of control will serve the public interest by permitting it to continue to provide high quality, reasonably priced services, and, therefore, to compete more effectively in the domestic and international telecommunications markets. STARS claims that it will be able to compete more effectively against much larger entities which have ready access to large financial resources. STARS notes that its present management will remain in place, headed by Mr. Olson, which it believes will promote continuity and improvement in its existing services.

6. This application represents the second stage of HIT's plan to obtain needed capital in order for its subsidiary, STARS, to compete more efficiently. In order to have access to a wider range of investment alternatives, STARS requested and received Commission authorization for the assignment of its Title III earth station licenses to Transmission Operator Provided Services (TOPS).[5] In view of the foregoing, we conclude that a grant of the instant application will serve the public interest by permitting STARS to continue its efforts to operate effectively and efficiently.

7. Accordingly, IT IS ORDERED that application File No. ITC-91-197-TC, requesting Commission consent to the transfer of control of STARS and its Section 214 international authorizations originally granted in File No. ITC-90-151, ITC-89-090, ITC-87-146, and ITC-85-070[6] to TC-USA, IS GRANTED.

8. IT IS FURTHER ORDERED that STARS, as a dominant carrier in its provision of international common carrier services, must file quarterly reports of revenue, number of messages, and number of minutes of originating and terminating traffic for all countries authorized in para. 7 individually within 90 days from the end of each calendar quarter.

9. IT IS FURTHER ORDERED that STARS must continue to maintain tariffs pursuant to Section 203 of the Communications Act of 1934, as amended, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this order.

10. IT IS FURTHER ORDERED that STARS must file annual reports of overseas telecommunications traffic as required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

11. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.1(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] The transfer of control in this case does not involve a transfer to a separate entity, but results from an increase in stock ownership by an existing stockholder.

[2] There are a total of 11 HIT shareholders; none of the remaining 8 shareholders owns more than 7%, with six of them owning less than 1%.

[3] Mr. Olson had voting control prior to becoming the voting trustee for TC-USA's 28.39% of the stock. Since Mr. Olson was in control both prior to and subsequent to the voting trust, STARS did not file a *pro forma* transfer of control application.

[4] By letter dated December 4, 1991, STARS informed the Commission that TC-USA had acquired approximately 38% of additional common voting shares of HIT, and simultaneously placed them under the control of the voting trustee, Roger H. Lang.

[5] Letter dated June 17, 1991, from George S. Li, Chief, International Facilities Division, Common Carrier Bureau, FCC, to Robert E. Conn, Shaw, Pittman, Potts & Trowbridge, File No. CSG-91-107-AL.

[6] *See* 5 FCC Rcd 6680, 4 FCC Rcd 5028, 2 FCC Rcd 7185, and Mimeo 3173, released March 19, 1985.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-494

In the Matter of

Regulatory Policies and
International Telecommunications

MEMORANDUM OPINION AND ORDER ON FURTHER RECONSIDERATION

Adopted: February 10, 1992; Released: February 28, 1992

By the Commission:

1. On February 21, 1989, Consortium Communications International, Inc., (CCI) filed a petition for Partial Reconsideration of the *Reconsideration Order* in this proceeding.[1] CCI challenges a requirement that it file quarterly reports regarding its U.S. interstate traffic and revenues in 1988, 1989, and 1990, and the Commission's conclusion that it is owned by foreign telecommunications entities and therefore considered "dominant" for the provision of international telecommunications services originating or terminating in the United States. We partially grant CCI's petition and excuse it from filing 1989 and 1990 reports because the Chief, International Facilities Division, has determined that CCI became a non-dominant carrier in 1989 as a result of the acquisition by a U.S. company of the stock formerly held by foreign telecommunications interests.[2] However, we hereby reaffirm the requirement that CCI file interstate traffic and revenue reports for 1988.

2. CCI's request to be excused from filing reports for 1988 is procedurally defective because CCI failed to file a timely challenge to the 1988 *Report and Order* that originally imposed the reporting requirement on CCI. [3] Moreover, we find unpersuasive CCI's assertion that the Commission failed to justify its decision in the *Reconsideration Order* to limit application of the reporting requirement to those three carriers, including CCI, considered to be dominant because they were owned by foreign telecommunications entities. The *Reconsideration Order* balanced the concerns in the record regarding the benefits and the burdens of the reporting requirement, and reasonably concluded, on the record then before it, that the limited reporting requirement would enable it "to monitor whether carriers owned by foreign telecommunications entities are using market power to influence the price of U.S. international telecommunications services or the development of competition in U.S. and international telecommunications services markets."[4] On December 12, 1991, we adopted a Notice of Proposed Rule Making to review our regulation of international common carrier services provided by foreign-owned U.S. carriers.[5]

3. We conclude that CCI must file traffic and revenue reports for 1988 because, although it became 100% U.S. owned in 1989, it clearly had foreign telecommunications entity ownership in 1988 that exceeded 15% and was therefore properly classified as "dominant." With regard to CCI's contention that there was no evidence to support the holding in the *Reconsideration Order* that CCI was owned by foreign telecommunications entities, we note that the *Reconsideration Order* did not classify CCI as dominant. Rather, the Common Carrier Bureau had in 1986 found CCI to be dominant because of substantial (40%) stock ownership by a foreign telecommunications entity.[6] That finding remained in effect until 1989, when CCI became 100% U.S.-owned. Throughout 1988 CCI was 34% owned by Air Call, a British telecommunications provider and, until August 17, 1988, was also 15% owned by Italcable, an Italian government-owned telecommunications provider. Even were we to agree with CCI that Air Call is not a foreign telecommunications entity,[7] we would still conclude that CCI was dominant during 1988. CCI does not challenge that Italcable had a 15% interest in CCI and an Italcable representative on CCI's board of directors for the majority of 1988. The fact that Italcable had a representative on CCI's board during 1988 was sufficient to trigger the reporting requirement. Accordingly, CCI has presented no ground for being relieved of its 1988 reporting obligation.[8]

4. Accordingly, IT IS ORDERED that CCI's Petition for Partial Reconsideration IS GRANTED TO THE EXTENT DISCUSSED HEREIN AND OTHERWISE DENIED.

5. IT IS FURTHER ORDERED that CCI shall file the report required by Section 43.81 of the Commission's Rules and Regulations, 47 C.F.R. §43.81 (1989), for the calendar year 1988 within 60 days of the release of this Order.

6. IT IS FURTHER ORDERED that CCI is not required to file Section 43.81 reports for calendar years 1989 and 1990.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *Regulatory Policies and International Telecommunications*, CC Docket 84-494, 4 FCC Rcd 323 (1989) (*Reconsideration Order*).

[2] *CCI*, 4 FCC Rcd 5467 (Com. Car. Bur., 1989).

[3] *See Regulatory Policies and International Telecommunications*, Report and Order and Supplemental Notice of Inquiry, CC Docket 86-494, (released March 25, 1988) (*Report and Order*) (imposing a reporting requirement on all interstate service providers with more than 15% ownership by foreign telecommunications entities or a foreign telecommunications entity representative on the U.S. carrier's board of directors). CCI also failed to file a timely challenge to the Commission's original order holding that all carriers providing international service from the United States with more than 15% ownership by foreign telecommunications entities or a foreign telecommunications entity representative on the U.S. carrier's board of direc-

tors would be considered dominant. *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *reconsideration denied*, 60 R.R. 2d 1435 (1986).

[4] *Reconsideration Order*, 4 FCC Rcd at 337. Likewise, the general evaluation of the costs and benefits of the reporting requirement, both in the *Order* and the *Reconsideration Order*, belie CCI's assertion that the Commission failed to consider principles of comity and equity in imposing a reporting requirement on CCI.

[5] In the Matter of Regulation of International Common Carrier Services, CC Docket No. 91-360, FCC 91-402, adopted December 12, 1991.

[6] *See Consortium Communications International Inc.*, File No. ENF-86-07 (Mimeo 4169) (released April 30, 1986).

[7] CCI argues that Air Call, which provides a variety of "telecommunications and non-telecommunications services in the United Kingdom," should not be considered a foreign telecommunications entity.

[8] We also reject CCI's claim that the *Reconsideration Order* broadened the definition of "foreign-owned entity" without notice and irrationally. CCI argues merely that (1) a footnote in the *Reconsideration Order* is misleading because it suggests that the Commission was adopting the same definition for "foreign telecommunications entity" as it adopted in the *International Competitive Carrier* proceeding, although the Commission adopted no such definition in the *International Competitive Carrier decision;* and (2) the *Report and Order* is confusing because it contains two slightly different definitions of "foreign telecommunications entity." Although the *International Competitive Carrier decision* did not actually define "foreign telecommunications entity," CCI fails to explain how this statement in the *Reconsideration Order* has any relevance to its appeal. The alleged inconsistency in the definitions in the *Report and Order* (one definition is broader than the other and includes the phrase "but not limited to") is immaterial to CCI's petition because our application of the reporting requirement to CCI is not based on the broader language. In addition, CCI fails to explain why it could not have filed a timely challenge to the *Report and Order* if it felt there were any inconsistencies in that order.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
February 24, 1992

Released: February 28, 1992

Lawrence M. Miller, Esq.
Schwartz, Woods and Miller
The Dupont Circle Building, Suite 300
1350 Connecticut Ave., N.W.
Washington, D.C. 20036-1702

Dear Mr. Miller:

This is in response to your request for declaratory ruling, filed February 20, 1992, seeking a news exemption from Section 315 of the Communications Act for a program to be aired on radio station WWRC, Washington, D.C., on February 27, 1992. Specifically, you ask the Commission to exempt an eight-hour block of time in which major Republican and Democratic candidates for the office of President on the March 3 Maryland primary election ballot will be featured as part of "on-the-spot coverage of a bona fide news event" under Section 315(a)(4).

Due to the need for expeditious treatment of your request, we are attaching it as an Appendix to this letter to serve as a full recitation of the facts of the request. The proposed programming format will involve an allotment of one-hour for each candidate, which will include a live, unedited statement by the candidate, to be followed by questions from WWRC staff personnel, including news reporters, and possibly representatives of other news organizations. The format will also include telephone questions from the listening audience to be screened by WWRC. The programming will also be offered to other broadcast stations in Maryland as coverage of a news event. You explain that the candidates were chosen for their participation based on the results of the New Hampshire primary election and other objective polling information. The order of their appearance will be based on the sequence of acceptances to the station's simultaneous invitations to participate in the program. You also note that since there are only two Republican candidates on the ballot, if either rejects your invitation, the station will not air the other candidate. Thus, as a practical matter, you state that the exemption request is unnecessary for the Republican side of the primary.

It appears that your request comports in all key respects with the Commission's recent decision in *King Broadcasting, Inc.*, 6 FCC Rcd. 4998 (1991), wherein the Commission granted a Section 315(a)(4) "news event" exemption to a programming proposal involving back-to-back taped appearances of Presidential candidates for the 1988 campaign, as well as separate taped interview segments. Consistent with *King*, there is no information before us to bring into question WWRC's good faith journalistic judgment in deciding to present this programming. Similar to *King* as well, the format involves back-to-back candidate appearances and questioning by news personnel, with no apparent opportunity for licensee favoritism in the format.

Based on the foregoing, your request for declaratory ruling IS GRANTED.

Staff action is taken here pursuant to delegated authority.

Sincerely,

Milton O. Gross, Chief
Fairness/Political Programming Branch
Enforcement Division
Mass Media Bureau

APPENDIX

February 20, 1992

Milton O. Gross, Esquire
Chief, Political Programming Branch
Enforcement Division
Mass Media Bureau
Federal Communications Commission
2025 M Street, N.W., #8202
Washington, D.C. 20554

Re: Station WWRC(AM)
Washington, D.C.

Dear Mr. Gross:

On behalf of Greater Washington Radio, Inc., licensee of standard broadcast Station WWRC, Washington, D.C., we hereby request a declaratory ruling that the proposed programming described herein would constitute on-the-spot coverage of a bona fide news event and thus be exempt from equal opportunities obligations under Section 315(a)(4) of the Communications Act of 1934 as amended and Section 73.1941(a)(4) of the Commission's rules. Station WWRC has a talk format and serves a substantial area of Maryland, which is holding its presidential primary elections on March 3, 1992. There are two candidates for the Republican presidential nomination and six candidates for the Democratic presidential nomination on the Maryland ballot. Write-ins are not permitted.

The Maryland primaries are shaping up as particularly newsworthy in view of the results of the New Hampshire primaries earlier this week. Station WWRC is planning to schedule a one-day special block of news programming for Thursday, February 27, 1992 between 10 a.m. and 6 p.m. focused on the primaries. The programming would be offered to an ad-hoc network of radio stations around the state as a news event.

As a part of the station's special news block it would offer each of the major candidates in the Democratic and Republican primaries one hour of air time. Because of

the obvious difficulties in scheduling appearances by the major candidates, while the appearances will all be in the same special coverage block it is possible that there will be gaps between some of the appearances. The candidates would be selected for invitation based on the New Hampshire primary results and on standings in significant objective public opinion polls. Based on its journalistic judgment the licensee contemplates inviting both Republican candidates and five of the six Democratic candidates who are listed on the Maryland ballot to participate.

Each candidate would have an opportunity to make a brief opening statement to convey the essential message of his campaign to the audience, would be interviewed by the station's regular talk-show hosts and by reporters (from the station and possibly from other news organizations), and would then take questions from listeners around the state of Maryland in a "town hall" format. The listener questions would be placed through a statewide 800 toll-free number and would be screened by the station staff without any input from the candidates. Calls would be put through to the candidates based on programmatic, and not partisan political, considerations.

Each of the major candidates selected for invitation would be offered the opportunity to participate in person at the station's studios or by telephone. Invitations will be issued to all of those candidates at the same time, and the order of presentation will be set by providing choices of time periods to each candidate in the order in which the candidates accept the invitations. In the event that a candidate accepts the offer to participate but wishes to limit his appearance to less than an hour, the candidate will be given such an opportunity. The licensee will provide the same opportunity to each candidate invited, and any such limitation would be solely at the candidate's volition.

The proposed programming will be a news event of special significance for the voters of the state of Maryland and for the general listening public. To the best of the licensee's knowledge this will be the only opportunity for the electorate in Maryland to hear successive broadcast presentations aimed at a Maryland audience and involving all of the major candidates who choose to participate.

The licensee is inviting both of the Republican candidates and obviously could not schedule matched appearances by them unless both accept. Therefore, we do not request a ruling with respect to the part of the program block which will concern that primary. However, assuming that more than one candidate in the Democratic primary accepts, the licensee wishes to broadcast presentations of those Democratic candidates without incurring equal opportunities obligations to one ballot candidate who, in its opinion, based on objective evidence, is not a significant factor in the race and without incurring equal opportunities obligations to any of the invited candidates who decline to appear.

The licensee believes that the proposed presentations meet the test for exemption established in *Aspen Institute*, 55 FCC 2d 697 (1975), *aff'd sub nom. Chisholm v. FCC*, 538 F.2d 349 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976), and are analytically indistinguishable from the type of presentation ruled exempt in *King Broadcasting Company*, 6 FCC Rcd 4998 (1991). The program would be genuinely newsworthy and the licensee has evaluated the newsworthiness of the event based on its good faith news judgment and not to advance any particular candidacy. Major candidates for nomination to the highest elective office will set forth their essential campaign messages and face questioning from and spontaneous interaction with professional journalists and the Maryland electorate just five days before a key primary election.

The licensee believes that its proposed programming would help materially to inform the electorate and asks that you rule it exempt so that arrangements may proceed.

Respectfully submitted,

SCHWARTZ, WOODS & MILLER

By: Lawrence M. Miller

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-188

In the Matter of

Amendment of Section 73.202(b), RM-7104
Table of Allotments,
FM Broadcast Stations.
(Patterson, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 20, 1992; Released: March 2, 1992

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 5 FCC Rcd 2141 (1990), issued in response to a petition filed by Eric R. Hilding ("Hilding") proposing the allotment of FM Channel 246A to Patterson, California, as that community's second local FM broadcast service. Hilding and Miklos Benedek ("Benedek") each filed supporting comments in response to the *Notice*. CalValley Radio Limited Partnership ("CalValley"), licensee of Station KVFX(FM), Channel 244A, Manteca, California, filed opposing comments and an alternative proposal, to which Hilding as well as Goldrush Broadcasting, Inc. ("GBI"), licensee of Station KDJK(FM), Channel 236B, Oakdale, California, responded. CalValley filed a response to the reply comments and a motion to accept. GBI filed further comments.[1]

2. Initially, CalValley questions Hilding's eligibility to express an interest in applying for Channel 246A at Patterson, alleging that he already has numerous petitions for new FM allotments on file, whereas Section 73.3555(d) of the Commission's Rules prohibits an individual from having a cognizable interest in more than twelve FM stations unless minority ownership is specified, and that Section 73.3518 prohibits the filing of inconsistent applications by one individual. CalValley also asserts that the interest expressed herein by Miklos Benedek should not be treated separately from Hilding since the two have typically filed jointly in several allotment proceedings.

3. In the event we determine that Hilding's proposal is acceptable, CalValley offers an alternative proposal to allot Channel 238A in lieu of Channel 246A to Patterson. CalValley states that Channel 238A can be allotted as a 6 kilowatt Class A facility whereas Channel 246A would be limited to 3 kilowatts. In further support of its proposal, CalValley claims that Channel 238A would require a site restriction of only 5 kilometers west of the community[2] to avoid short-spacing to Station KDJK(FM), Channel 236B, Oakdale, California, and to vacant Channel 238A at Carmel, California,[3] for which five applications are pending, whereas Channel 246A requires a site restriction 8.9 kilometers west. Thus, CalValley believes that the public interest would be better served by allotting a 6 kilowatt Class A channel to Patterson at a less restrictive site.

4. In response to CalValley's alternate proposal, Hilding objects to the proposed consideration of Channel 238A in lieu of Channel 246A at Patterson, alleging that it is technically and environmentally unacceptable. Hilding avers that the coordinates suggested by CalValley would place an antenna for Channel 238A within 200 feet of U.S. Interstate 5, thus raising safety considerations. Hilding claims that the elevation at the suggested site for Channel 238A is only 97.5 meters (320 meters AMSL), whereas the average terrain from the eight standard radials is 167.3 meters (548.9 feet AMSL). Hilding notes that the HAAT at the site level is -69.8 meters (-229 feet AMSL). Therefore, Hilding states that a full Class A facility (6 kW at 100 meters HAAT) at CalValley's specified site would require a minimum tower height of 169.8 meters (557 feet). Hilding claims that a tower of that height would require the guy wires to cross the Interstate highway. Additionally, Hilding asserts that CalValley's site reference for Channel 238A is less than one mile from the Patterson airport, which would likely raise FAA concerns. Although Channel 246A is limited to 3 kilowatts, Hilding asserts his proposal would realistically serve a greater population since it could operate with maximum facilities (100 meters) without the inherent technical and environmental constraints associated with suggested Channel 238A. Hilding also believes that CalValley's alternate proposal, which would require Station KDJK(FM), Channel 238A, Oakdale, California, to specify a new site for its pending modification application (File No. BPH-891003IC) would unnecessarily burden that licensee's attempt to improve service to the public at its community of license.[4]

5. Petitioner refutes CalValley's assertion that his expression of interest in applying for Channel 246A is invalid, stating that the number of proposals in which he is currently involved does not exceed the maximum allowable limit specified by the Commission. Moreover, petitioner rebuts CalValley's assertion that the interest expressed herein by Benedek should not be viewed separately in view of their several joint filings in other allotment proceedings. Petitioner states that in three instances

[1] Although the Commission's Rules do not contemplate the filing of pleadings beyond the comment and reply comment period, we will accept CalValley's and GBI's responses since they will enable us to resolve this proceeding on the basis of a complete record. *See* Section 1.425 of the Commission's Rules.

[2] Coordinates initially suggested by CalValley for Channel 238A at Patterson are 37-28-10 and 121-11-11.

[3] Coordinates at the licensed site of Station KDJK(FM), Oakdale, are 37-47-34 and 120-31-08. Coordinates used for Channel 238A at Carmel, California, are 36-33-24 and 121-55-00.

[4] The distance between suggested Channel 238A at Patterson and the site specified in the modification application of Station KDJK(FM) at Oakdale at coordinates 37-49-39 and 120-34-03 is 67.5 kilometers, whereas a distance of 69 kilometers is required in this instance.

in which he filed jointly with Benedek, Hilding withdrew his interest in one proposal (*Goleta, California*, MM Docket No. 90-175, 6 FCC Rcd 4804 (1991)), and Benedek changed his support in another pending proceeding (*El Rio and Ojai, California*, MM Docket No. 90-174, 6 FCC Rcd 5547 (1991)).

6. GBI also objects to CalValley's alternate proposal for Channel 238A since, as noted above, it is short-spaced to its pending application to modify the facilities of Station KDJK(FM).[5] GBI echoes petitioner's belief that Channel 238A is technically inferior since the only area available for Channel 238A is a very restricted one. GBI claims that the site specified by CalValley is located on Interstate 5. Not only would such a site create environmental concerns, but GBI adds that the FAA traditionally objects to towers in the immediate vicinity of thoroughfares which are used for visual flight navigation. GBI states that due to spacing constraints, there is no other site to accommodate Channel 238A as a 6 kilowatt facility, which could simultaneously meet the requirements of Section 73.207(b) of the Commission's Rules with respect to area stations at Los Gatos (Channel 237A), Carmel (Channel 238A) and San Francisco (Channel 239B). Aside from the technical objections, GBI notes that the absence of any proponent to timely express an interest in applying for Channel 238A at Patterson requires CalValley's proposal to be dismissed.

7. CalValley responds that contrary to petitioner's assertions, its proposal is not flawed and is superior to proposed Channel 246A. CalValley states that although it arbitrarily selected the closest reference point to Patterson, its engineering consultant has determined that another technically acceptable site[6] is available to accommodate its alternate proposal, which is free of airspace encroachment and other technical FAA considerations. CalValley notes that its alternate site also meets the minimum distance separation requirements to the reference coordinates at Carmel, California, as well as GBI's pending modification application at Oakdale.[7] Additionally, CalValley refutes petitioner's allegation that the tower height required to accommodate Channel 238A at its suggested site would exceed FAA requirements.[8]

8. CalValley also disputes GBI's claim that there is no valid expression of interest in Channel 238A. CalValley comments that because the Commission may allot whichever channel it determines is more conducive to serving the public interest, it is not obligated to allot the preferred numerical channel of any specific party. Regardless, CalValley remarks that if the Commission deems its expression of interest is required, it will apply for Channel 238A if it is allotted to Patterson.

9. GBI opposes acceptance of CalValley's belated expression of interest in the absence of good cause. In addition, GBI claims that, based upon its engineering analysis, when the amended site specified by CalValley is transferred to a Sectional Aeronautical Chart, the tower for Channel 238A would be approximately two miles south of the Crows Landing Naval Air Base, which GBI describes as an active training facility, and in alignment with one of the main runways. Accordingly, GBI claims that since the transmitter location proposed by CalValley is very limited, and susceptible to rejection by certain Federal authorities, the alleged superiority of Channel 238A is further diminished.[9]

10. After careful consideration of the comments and responses filed in this proceeding, we believe that the public interest would be served by allotting Channel 246A to Patterson, California. As explained below, we do not believe that CalValley has demonstrated sufficient reasons why Channel 238A should be allotted to Patterson in lieu of Channel 246A, as proposed in the *Notice*.

11. Preliminarily, we disagree with CalValley's assertion that petitioner is ineligible to express an interest in the Patterson channel based upon his numerous application filings. Although Section 73.3518 of the Commission's Rules forbids the filing of inconsistent or conflicting applications by the same party, CalValley cites no precedent in which the Commission has applied Section 73.3518 in the rule making context. Nor has CalValley demonstrated that there would be any contour overlap, in violation of Section 73.3555, between the Patterson proposal and any other proposal in which the petitioner is the only party of interest. Nor will we will consider petitioner and Benedek's expressions as mutual interests, as requested by CalValley, simply because the two parties have filed joint expressions of interest in other prior proceedings. Rather, we will consider Benedek's comments as a second expression of interest in the Patterson channel.

12. In the same vein, we will not exclude CalValley's late-filed expression of interest in pursuing its alternate channel proposal, as urged by GBI. While the Commission will not consider a late-filed expression of interest in a contested proceeding, it may do so where there would be no adverse impact on another pending rule making proceeding. *See Gosnell and Osceola, AR, et al.*, 6 FCC Rcd 4579 (1991).[10]

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[5] We note that GBI's modification application for Channel 236B at Oakdale, CA (File No. BPH-8910031C) was granted February 13, 1992.

[6] Reference coordinates at the amended site suggested by CalValley are 37-27-44 and 121-11-36.

[7] See footnote 2, *supra*.

[8] In this regard, CalValley claims that a tower of 199 feet AGL, which it suggests could be constructed at or near its amended site, is below the height for which FAA approval is ordinarily required. In addition, CalValley advises that tower heights of less than 500 feet are generally permissible for sites within two statute miles of an interstate highway.

[9] GBI adds that since it appears that Channel 246A could be utilized from an elevation above Patterson, a 3 kW operation, assuming an antenna height of 500 feet AGL, could place a 60 dBu contour a distance of approximately 29 kilometers (18 miles). Conversely, CalValley's 6 kW proposal for Channel 238A, at a height of 199 feet AGL, would extend the 1 mV/m contour a distance of approximately 22.5 kilometers (14 miles). Thus, GBI asserts there is a distinct advantage to be gained from transmission on Channel 246A at a higher elevation compared with the minor gain derived from doubling power, as proposed by CalValley.

[10] Additionally, were we inclined to locate an alternate equivalent class of channel for Patterson, we could do so on our own motion in the course of this proceeding, regardless of an expression of interest in any specifically requested channel. *See, e.g.*, paragraph 3(c) of the Appendix to the *Notice; see also Vacaville and Middletown, CA*, 4 FCC Rcd 8315 (1989), and cases cited therein.

13. A staff engineering analysis confirms that the alternate site proposed by CalValley at coordinates 37-27-44 and 121-11-36 to accommodate requested Channel 238A at Patterson, would place the transmitter approximately 0.8 kilometers (0.5 miles) southwest of Interstate 5. From that location, our analysis indicates there should be adequate space to stabilize the guy wires between the tower and the Interstate. Nor would CalValley's proposed site contravene the requirements of Section 73.315 of the Commission's Rules to provide a 70 dBu signal over Patterson. Also, our analysis does not reveal any obvious FAA concerns at CalValley's amended site.

14. Although CalValley's proposal is technically feasible, and meets the minimum distance separation requirements to the reference coordinates for Channel 238A at Carmel,[11] it would require the five pending applicants at that community to amend their applications.[12] We recognize that Section 73.208(b)(1) of the Commission's Rules requires protection only to the reference coordinates for Channel 238A at Carmel, and none of the applicants are entitled to have their individual site preferences protected by the rule making proposal. Nevertheless, we attempt to accommodate applicants in jeopardy of being dispaced by adoption of a rule making proposal. *See Grover City, CA*, 5 FCC Rcd 1346 (1990). This is especially true where, as here, CalValley has not demonstrated that the benefits of allotting a 6 kilowatt channel to Patterson offset the consequent burden which would be imposed upon the Carmel applicants. We also believe it would be improper to displace the Carmel applicants when the available area for Channel 238A is severely limited. By rejecting CalValley's proposal, we will eliminate undue disruption to the application process at Carmel and not unduly hinder the ultimate selection of a permittee to initiate service to that community.[13]

15. As stated in the *Notice*, Channel 246A can be allotted to Patterson consistent with the minimum distance separation requirements of the Commission's Rules, provided the transmitter is located at least 8.9 kilometers (5.5 miles) west of the community[14] to avoid short-spacing to Station KABX-FM, Channel 248B, Merced, California.[15]

16. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 13, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Patterson, California	226B, 246A

17. The window period for filing applications for Channel 246A at Patterson, California, will open on **April 14, 1992,** and close on **May 14, 1992.**

18. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

19. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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[11] Coordinates used for Channel 238A at Carmel are 36-33-24 and 121-55-00.

[12] *See*, File Nos. BPH-880210ML, BPH-880208MK, BPH-880211MK, BPH-880211ML and BPH-880211MM.

[13] As the Patterson proposal was filed prior to October 2, 1989, the effective date of the *Second Report and Order* in MM Docket No. 88-375, 4 FCC Rcd 6375 (1989), the proposal is entitled to consideration pursuant to the minimum distance separation requirements set forth in Section 73.213(c) of the Commission's Rules. We note that consideration of Channel 238A as a 3 kilowatt channel at CalValley's suggested site for Channel 246A would meet the minimum distance separation requirements to the Carmel reference point as well as to all five pending applications at that community. However, since Channel 238A would be equivalent to Channel 246A, in that it would permit operation with the same maximum power to which petitioner would be entitled on Channel 246A, we find no justifiable reason to disturb the petitioner's proposal.

[14] Coordinates used for Channel 246A at Patterson are 37-29-19 and 121-13-37. Because this allotment is made as a result of a petition for rule making filed prior to October 2, 1989, applicants for Channel 246A at Patterson may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's Rules with respect to Station KVFX(FM), Channel 244A, Manteca, California, at coordinates 37-43-45 and 121-11-49, as well as to Station KWAV(FM), Channel 245B, Monterey, California, at coordinates 36-32-05 and 121-37-14.

[15] Coordinates at the licensed site of Station KABX-FM are 37-22-31 and 120-27-37.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-31

In the Matter of

Amendment of Section 73.202(b), RM-7908
Table of Allotments,
FM Broadcast Stations.
(East Ridge, Tennessee)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 20, 1992; Released: March 2, 1992

Comment Date: April 20, 1992
Reply Comment Date: May 5, 1992

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Sattler Broadcasting, Inc. ("petitioner"), licensee of Station WJRX(FM), Channel 300A, East Ridge, Tennessee, requesting the substitution of Channel 300C3 for Channel 300A at East Ridge and modification of its license for Station WJRX(FM) to specify operation on the higher powered channel.[1]

2. We believe the public interest would be served by proposing the substitution of Channel 300C3 for Channel 300A at East Ridge, since it could provide the community with a wide coverage area FM service. Channel 300C3 can be allotted to East Ridge in compliance with the Commission's minimum distance separation requirements with a site restriction of 21.8 kilometers (13.6 miles) northwest to accommodate petitioner's desired site.[2] As requested, we also propose to modify petitioner's license for Station WJRX(FM) to specify operation on Channel 300C3. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at East Ridge or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
East Ridge, Tennessee	300A	300C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **April 20, 1992,** and reply comments on or before **May 5, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

William H. Crispin, Esq.
Verner, Liipfert, Bernard,
McPherson & Hand
901 15th Street, N.W.
Suite 700
Washington, D.C. 20005-2301
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an

[1] We note that petitioner has failed to state it will apply for Channel 300C3, if allotted. An expression of interest is required before a channel can be allotted, and absent of such an expression of interest, it is the Commission's policy to refrain from allotting the channel. *See e.g., Murray, Kentucky*, 3 FCC Rcd 3016 (1988) and *Pine, Arkansas*, 3 FCC Rcd 1010 (1988). Therefore, petitioner is requested to clarify this matter when submitting its comments.

[2] The coordinates for Channel 300C3 at East Ridge are North Latitude 35-06-31 and West Longitude 85-24-28.

ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-260

In the Matter of

Amendment of Section 73.606(b), RM-7788
Table of Allotments,
TV Broadcast Stations.
(Eureka Springs, Arkansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 20, 1992; Released: March 2, 1992

By the Assistant Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 6 FCC Rcd 5313 (1991), issued in response to a petition filed on behalf of New Life Evangelistic Center, Inc. ("petitioner") proposing the allotment of UHF Channel 34 to Eureka Springs, Arkansas, as that community's first local television broadcast service. Petitioner filed comments in support of the proposal. Additionally, comments were filed by Butler Broadcasting, Inc.[1] ("BBI"), licensee of Station KTCN(FM), Channel 265A, Eureka Springs, Arkansas, to which petitioner responded.

2. Eureka Springs (population 1,989)[2] in Carroll County (population 18,203), is located approximately 225 kilometers (140 miles) northwest of Little Rock.

3. We believe the public interest would be served by allotting Channel 34 to Eureka Springs since it would provide the community with its first local television broadcast service. As stated in the *Notice*, Channel 34 can be allotted to Eureka Springs in conformity with the minimum distance separation requirements of Sections 73.610 and 73.698 of the Commission's without the imposition of a site restriction.[3] However, the allotment of Channel 34 to Eureka Springs will require a plus offset.[4] Moreover, although the Commission has imposed a freeze on new television allotments or applications therefor in certain metropolitan areas, Eureka is not in one of the affected areas.[5]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 13, 1992**, the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

City	Channel No.
Eureka Springs, Arkansas	34+

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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[1] BBC's comments contravene the requirements of Section 1.52 of the Commission's Rules which requires that the original of any documents filed with the Commission by a party not represented by counsel shall be signed and verified by the party and his/her address stated. In the absence of such verification, a pleading may be returned as unacceptable. *See Monroeville, AL*, 5 FCC Rcd 7027 (1990). Section 1.402(b) of the Rules concerning rule making proceedings places petitioners on notice that their proposal must comply with the requirements of Section 1.52 regarding subscription and verification. Moreover, BBC's comments were not filed in accordance with the requirements of Section 1.420(c) of the Commission's Rules, and consequently, they will not be considered in this proceeding. *See* Sections 1.1202(b)(1) and 1.1208 of the Commission's Rules. As a result of our determination, petitioner's responsive comments thereto will not be discussed. Even if we were to consider BBI's comments, the resolution of this proceeding would not be affected. BBI argues that the allotment of Channel 34 could lead to "a continued dilution of broadcast revenues." However, the Commission no longer considers the economic effects of new stations on existing services when making allotments. *See Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Services*, 3 FCC Rcd 638 (1988).

[2] Population figures were taken from the 1980 U.S. Census.

[3] Coordinates used for Channel 34 at Eureka Springs are 36-24-12 and 93-44-12.

[4] "A station with a 'plus' or 'minus' offset is required to operate with its carrier frequency 10 kHz above or below the normal carrier frequency. A different offset between two television stations reduces interference and makes possible the separation criteria set forth in our Rules." *Crandon, WI*, 3 FCC Rcd 6765 n.1 (1988).

[5] *See Order, Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, 52 Fed. Reg. 28346, July 29, 1987.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-590

In the Matter of

Amendment of Section 73.202(b),	RM-7071
Table of Allotments,	RM-7855
FM Broadcast Stations.	
(Sumter, Orangeburg and Columbia, South Carolina)[1]	

REQUEST FOR SUPPLEMENTAL INFORMATION

Adopted: February 20, 1992; Released: March 2, 1992

Comment Date: April 20, 1992
Reply Comment Date: May 5, 1992

By the Assistant Chief, Allocations Branch:

1. At the request of Gamecock City Broadcasting, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 10 (1990), proposing the reallotment of Channel 267C from Sumter to Columbia, South Carolina, and the modification of Station WWDM's license accordingly. In response to the *Notice*, the petitioner filed comments and reply comments supporting the reallotment of Station WWDM to Sumter. In addition, Radio South Carolina, Inc. ("RSC"), licensee of Station WTCB(FM), Orangeburg, South Carolina, filed a counterproposal/petition for rule making requesting the reallotment of Channel 294C1 from Orangeburg to Columbia, and the modification of Station WTCB(FM)'s license accordingly.[2,3] No other comments were received.

2. RSC claims that the reallotment of Channel 294C1 from Orangeburg to Columbia complies with the Commission's allotment policies. It states that Orangeburg, with a population of 14,933 persons, receives local aural transmission service from three AM stations, three commercial FM stations, and one noncommercial educational FM station.[4] Columbia, on the other hand, with a population of 101,229 persons, which is almost seven times greater than that of Orangeburg, receives local aural transmission service from six AM stations, four commercial FM stations and three noncommercial educational FM stations. The disparity in station-to-population ratio is even greater if Columbia's Metropolitan Statistical Area population of 410,088 persons is taken into account. RSC notes that Sumter's 24,890 residents receive local aural transmission service from three AM and two FM stations. Thus, RSC argues that its proposal should be preferred over the petitioner's proposal, if a choice must be made, because Orangeburg has more services per person than Sumter's (one service for every 2,489 Orangeburg residents vs. one service for every 4,978 Sumter residents). However, it requests that both proposals be adopted.

3. Based on the information before us, we are unable to determine whether granting either or both of the proposals would result in a preferential arrangement of allotments. As stated in the *Change of Community MO&O*,[5] proposals seeking to invoke Section 1.420(i) of the Rules will be considered pursuant to the relevant FM allotment priorities and policies.[6] Neither of the proponents in this proceeding seek to relocate their transmitters or improve their facilities, as their stations already cover Columbia with a 70 dBu city-grade signal. Thus, there is neither a loss nor gain of reception service to any population. Neither proposal would result in the provision of a first local aural transmission service or a first or second reception service. Therefore, the proposals must be considered under the fourth priority, other public interest matters. In examining proposals to change a station's community of license under priority four, we believe that the mere reduction of the ratio of transmission services to population in the respective communities of license, absent service improvements or a showing that the needs of the community are currently unmet by the present arrangement of allotments, may not be sufficient to justify the removal of an existing transmission service which residents have come to rely upon. Therefore, the petitioner and RSC are requested to submit information sufficient to show that the proposals would result in a preferential arrangement of allotments in light of the *Change of Community MO&O*. No additional counterproposals will be accepted since an opportunity for the filing of such requests has already been provided.

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **April 20, 1992,** and reply comments on or before **May 5, 1992,** and are advised to read the Appendix for the proper

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[1] The community of Orangeburg has been added to the caption.

[2] We recognize that there is no technical conflict between the proposals of petitioner and RSC. However, as stated in *Harrisburg and Albemarle, North Carolina*, 7 FCC Rcd 108 (1992), we believe that these proposals should be considered simultaneously because of the impact each proposal has on the other. Therefore, for administrative ease, we have considered this proposal as a "counterproposal" for the purpose of giving public notice and setting forth a response period.

[3] Public Notice of the filing of the counterproposal was given on October 28, 1991, Report No. 1866.

[4] Population figures are taken from the 1980 U.S. Census.

[5] *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd 7094 (1990) (*"Community of License MO&O"*).

[6] The allotment priorities are (1) first fulltime aural service, (2) second fulltime aural service, (3) first local service, and (4) other public interest matters, with priorities (2) and (3) considered as being co-equal. *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).

procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Richard F. Swift, Esq.
Tierney & Swift
1200 - 18th Street, N.W.
Suite 210
Washington, D.C. 20036
(Counsel to petitioner)

Merrick C. Hayes, Esq.
Hayes, Schneider,
Hammer & Miles
202 North Center Street
Bloomington,
Illinois 61701-1162
(Counsel to RSC)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required*. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures*. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service*. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies*. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings*. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-351

In the Matter of

Amendment of Section 73.202(b), RM-7864
Table of Allotments,
FM Broadcast Stations.
(Detroit Lakes, Minnesota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 19, 1992; Released: March 2, 1992

By the Assistant Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 6 FCC Rcd 7217 (1991), proposing the allotment of Channel 272C2 to Detroit Lakes, Minnesota, as that community's second FM broadcast service. The *Notice* was issued in response to a petition filed by Robert D. Spilman ("petitioner"). Petitioner filed comments supporting the allotment of Channel 272C2 at Detroit Lakes and stated his intention to file an application for the channel if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 272C2 to Detroit Lakes, in order to provide the community with a second FM broadcast service. As indiated in the *Notice*, Channel 272C2 can be allotted to Detroit Lakes consistent with the Commission's spacing requirements without a site restriction.[1] Since Detroit Lakes is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained for this allotment.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 13, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Detroit Lakes, Minnesota	236C1, 272C2

4. The window period for filing applications for Channel 272C2 at Detroit Lakes, Minnesota, will open on **April 14, 1992,** and close on **May 14, 1992.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 272C2 are 46-48-54 and 95-50-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-241

In the Matter of

Amendment of Section 73.202(b), RM-7767
Table of Allotments,
FM Broadcast Stations.
(Topsail Beach, North Carolina)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 19, 1992; Released: March 2, 1992

By the Assistant Chief, Allocations Branch:

1. At the request of Topsail Broadcasting, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 5003 (1991), proposing the substitution of Channel 280C3 for Channel 280A at Topsail Beach, North Carolina, and the modification of Station WZXS' construction permit to specify the higher class channel. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 280C3 for Channel 280A at Topsail Beach because it could provide the community with a wide coverage area FM service and enable Station WZXS to expand its service area. Channel 280C3 can be allotted to Topsail Beach with a site restriction of 21.3 kilometers (13.3 miles) northeast to avoid a short-spacing to Channel 279C3 at Shallotte, North Carolina, and to accommodate petitioner's desired transmitter site. [1] As proposed, we will also modify petitioner's construction permit for Station WZXS to specify operation on the higher class channel.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 13, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Topsail Beach, North Carolina	280C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Topsail Broadcasting, Inc., for Station WZXS, Topsail Beach, North Carolina, IS MODIFIED to specify operation on Channel 280C3, in lieu of Channel 280A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Topsail Broadcasting, Inc., permittee of Station WZXS, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 280C3 at Topsail Beach are North Latitude 34-30-38 and West Longitude 77-28-45.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 3682

Tariff F.C.C. No. 2

ORDER

Adopted: February 20, 1992; Released: February 21, 1992

By the Deputy Chief (Policy), Common Carrier Bureau:

1. AT&T filed Transmittal No. 3682 on December 4, 1991, to revise its existing 800 Customer Specific Term Plan as 800 Customer Specific Term Plan II (CSTP II). AT&T will offer discounts between 19.5 and 23 percent to CSTP II customers who commit to monthly recurring and net usage revenue of $50,000 or more per month, for three years. In addition, AT&T will provide CSTP II customers a one-time usage credit of 0.5 percent, based on their first year annual revenue commitments. If CSTP II customers cancel their contracts at any time, they are subject to a cancellation charge of 35 percent of the remainder of their contract commitment. If CSTP II customers cancel within the first year, they must repay the usage credit. Transmittal 3682 is scheduled to become effective on February 22, 1992.

2. On December 19, 1991, MCI Telecommunications Corporation (MCI) filed a petition to reject, or in the alternative, to suspend and investigate Transmittal 3682. AT&T replied to MCI's petition on December 30, 1991.

3. MCI argues that Transmittal 3682 is anticompetitive because AT&T is leveraging its status as the dominant provider of 800 service to "lock-in" customers to term contracts extending beyond the anticipated date of full competition in the 800 number market. MCI Petition at 2-3. MCI also claims that the 35 percent penalty for early termination of CSTP II contracts is substantially greater than the 15 percent penalty associated with CSTP I contracts, and, as such, is evidence of AT&T's "lock-in" strategy under the subject tariff. *Id.* at 3, n.4. MCI then argues that such locking-in of CSTP II customers is an unreasonable practice under Section 201(b) of the Communications Act, 47 U.S.C. § 201(b), and is contrary to the Commission's findings in the *Interexchange Rulemaking*[1] and in the *GTE Airphone* case.[2] *Id.* at 6-7. MCI notes that, in the *Interexchange Rulemaking*, the Commission required AT&T to remove the cancellation penalties from its existing Tariff 12 plans to prevent customers dependent on specific 800 numbers from being locked-in to long term commitments that would prevent them from taking advantage of 800 number portability upon its arrival. *Id.* at 3-5. Similarly, argues MCI, absent rejection or suspension of the transmittal, the Commission should require AT&T to revise its transmittal to eliminate the cancellation penalty for switching to other carriers' 800 service when 800 portability becomes available. *Id.* at 7-8.

4. In its reply AT&T argues that a claim of leveraging must be based on a proof of market power and abuse of that power, which AT&T claims it has demonstrated it does not possess in 800 services. AT&T claims that the restructuring of CSTP I to offer greater discounts demonstrates that AT&T is responding to the intense competitive pressures in the 800 marketplace, rather than leveraging market power. AT&T Reply at 3-4. AT&T also argues that even a firm with monopoly power is allowed to compete vigorously to keep its customers through all means that are open to all competitors. Because AT&T's competitors already provide 800 term plans, AT&T contends that CSTP II is an ordinary marketing method available to all in the market. *Id.* at 4-5.

5. AT&T then argues that penalties for cancellation are consistent with the way AT&T's competitors have structured their own term plans. *Id.* at 5-6. Moreover, claims AT&T, its customers are sophisticated large volume users who are aware that 800 number portability will soon be effective and that there are penalties for early termination of CSTP II contracts. *Id.* at 67. AT&T then argues that the *Interexchange Rulemaking* addressed leveraging where another service was bundled with 800 service, whereas this transmittal is filed under the price cap rules, involves no other service, and, therefore, by definition, is not leveraging. *Id.* at 3-4, 7. Finally, AT&T contends that *GTE Airfone*, in which customers were restricted to the use of GTE equipment by exclusive contracts providing cancellation penalties and termination dates exceeding the term of GTE's experimental licenses, is in no way analogous to this transmittal because customers have numerous competitive alternatives for 800 service when they subscribe to CSTP II. *Id.* at 7-8.

6. The Common Carrier Bureau has reviewed AT&T Transmittal 3682 and all associated pleadings. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to require rejection, and that no question has been presented that warrants investigation at this time.

7. Accordingly, IT IS ORDERED that the petition to reject or suspend and investigate AT&T Tariff F.C.C. No. 2, Transmittal 3682, filed by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy),
Common Carrier Bureau

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[1] Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd 5880, 5905 (1991) (*Interexchange Rulemaking), recon. pending.*

[2] Memorandum Opinion and Order, Gen. Docket No. 88-96, FCC 91-164, In the Matter of Amendment of the Commission's Rules Relative to the Allocation of the 849-851/894-896 MHz bands, 6 FCC Rcd 4435 (1991) (*GTE Airfone). See also* Memorandum Opinion and Order, File No. 20336-CG-P/L-91, 6 FCC Rcd 4435 (1991) (*In Re Application of GTE Airfone Incorporated).*

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 82-434

In the Matter of

Amendment of Part 76, Subpart J,
Section 76.501 of the Commission's
Rules and Regulations to Eliminate
the Prohibition on Common Ownership
of Cable Television Systems and
National Television Networks

ORDER GRANTING EXTENSION OF TIME

Adopted: February 21, 1992; Released: February 21, 1992

Comment Date: March 23, 1992
Reply Comment Date: April 7, 1992

By the Chief, Mass Media Bureau:

1. On December 30, 1991, the Commission released a *Second Further Notice of Proposed Rulemaking* in MM Docket No. 82-434, 7 FCC Rcd 586 (1991) (*Second FNPRM,*) in order to seek further comment on our proposal to eliminate Section 76.501(a)(1) of our rules, which prohibits common ownership of cable television systems and national television networks. The *Second FNPRM* sought to update the record in this proceeding and also invited comment on options that would permit network ownership of cable systems subject to safeguards that address competition and diversity concerns. Accordingly, we established a deadline of **March 2, 1992,** for filing comments and a deadline of **March 17, 1992,** for filing reply comments.

2. Before the Commission is a motion for extension of time filed by Capital Cities/ABC, Inc. (Capital Cities/ABC) on February 18, 1992. The motion requests an extension of time to file comments until **April 1, 1992,** and reply comments until **April 16, 1992.**

3. Capital Cities/ABC requests an extension to permit Capital Cities/ABC, CBS, Inc., National Broadcasting Company, Inc., the Network Affiliated Stations Alliance, and the Association of Independent Television Stations to engage in further discussions to reach agreement about appropriate safeguards if networks are allowed to own local cable systems. All of the above-mentioned parties have agreed that a 30-day postponement in the comment dates for this proceeding would provide the needed opportunity for further discussion, and join in the motion.

4. As set forth in Section 1.46 of our rules, 47 C.F.R. § 1.46, it is our policy that extensions of time not be routinely granted. In this case, however, some additional time will allow the interested parties to continue a constructive discussion of the possible safeguards pertaining to network-cable cross-ownership, which may encourage an agreement that could assist us in resolving several concerns raised by interested parties. At the same time, we seek to proceed with this matter as expeditiously as possible, and are not persuaded that 30 additional days should be required for parties to conclude their discussions. Therefore, we will grant the motion in part and extend the deadlines for filing initial and reply comments by 20 days, respectively, to **March 23, 1992,** and **April 7, 1992.** We also note that we do not contemplate granting further extensions of time.

5. Accordingly, IT IS ORDERED that the Motion for Extension of Time filed by Capital Cities/ABC IS GRANTED IN PART, and the deadlines for filing comments and reply comments in this proceeding ARE EXTENDED to **March 23, 1992,** and **April 7, 1992,** respectively.

6. This action is taken pursuant to authority found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, and Sections 0.204(b), 0.283, and 1.46 of the Commission's Rules.

7. For further information on this proceeding, contact James Coltharp, Policy and Rules Division, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 88-567

In the Matter of

Amendment of Part 90 of the
Commission's Rules to Implement
a Conditional Authorization Procedure
for Proposed Private Land Mobile
Radio Service Stations

MEMORANDUM OPINION AND ORDER

Adopted: February 20, 1992; Released: March 2, 1992

By the Commission:

I. INTRODUCTION

1. The Commission has before it several petitions for reconsideration and related pleadings[1] concerning its November 1989 *Report and Order* (*Order*)[2] that implemented, effective June 30, 1990, a conditional licensing procedure for new and itinerant private land mobile radio stations operating on shared frequencies in the bands below 470 MHz and in the 929-930 MHz band. This conditional licensing program allows an applicant to operate its proposed station for a period of up to 180 days during the pendency of its application at the Commission if certain conditions are met. The program also encompasses applications for modification, assignment of authorization, or transfer of control of existing stations in these bands.

2. All of the petitioners request that we exclude the conditional licensing procedure from applying to applications that are filed under any of the proposed alternative methods of frequency coordination, such as the direct access method, that are currently being considered in our frequency coordination rule making proceeding (PR Docket No. 88-548).[3] As discussed below, the propriety of applying the conditional licensing procedure to any prospective "direct access" alternative method of frequency coordination will be considered in PR Docket No. 88-548.

3. In addition, AAR repeats its request made in previous comments that we exclude the Railroad Radio Service from the conditional licensing program. For the reasons indicated below, we deny this request. We also deny APCO's request to consolidate PR Docket No. 88-567 with PR Docket No. 88-548.[4]

II. BACKGROUND

4. Our *Order* specified that in order to operate under conditional licensing authority, the applicant must file a properly completed formal application that complies with Section 90.127 of the Rules [5] and that is accompanied by evidence of frequency coordination in accordance with Sections 90.175 and 90.176 of the Rules.[6] In addition, the applicant must certify that operation of the proposed station will satisfy six conditions.[7] The key condition, from the standpoint of conditional licensing, is condition number six (6): "The applicant has submitted an application to the Commission stating the frequency the applicant intends to use and that the frequency coordination requirements specified in §§ 90.175 and 90.176 for selection and use of this frequency have been satisfied."

5. At the heart of petitioners' concerns is the statement in our *Order* that we "contemplated" that the conditional licensing procedure would also apply to any new alternative methods of frequency coordination that are under consideration in PR Docket No. 88-548.[8] As a procedural matter, we also stated in our *Order* that the mailing of a direct access application would permit the applicant to commence conditional operations.[9] This statement was intended to clarify the procedure that will apply if we ultimately adopt the direct access proposal and decide to apply conditional licensing to the direct access alternative.

6. Petitioners assert that we should refrain from applying the conditional licensing procedure to any applications that utilize a "direct access" alternative method of frequency coordination.[10] They argue that coupling conditional licensing with the direct access procedure would allow an applicant to commence operations on a frequency it has selected prior to any analysis of the frequency choice by a frequency coordinator, the

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[1] A Joint Petition for Reconsideration was filed by the American Petroleum Institute (API) and the Special Industrial Radio Service Association, Inc. (SIRSA). Individual petitions for reconsideration were filed by the National Association of Business and Educational Radio, Inc. (NABER), the Associated Public Safety Communications Officers, Inc. (APCO), and the Association of American Railroads (AAR). An opposition to APCO's petition and a reply to the opposition were filed by Merrill T. See and APCO, respectively. Comments in support of the petitions were submitted by the Manufacturers Radio Frequency Advisory Committee, Inc. (MRFAC) and Hewlett-Packard Company's Medical Products Group.

[2] Report and Order, PR Docket No. 88-567, 4 FCC Rcd 8280 (1989).

[3] *See* Notice of Proposed Rule Making, PR Docket No. 88-548, 4 FCC Rcd 6325 (1989).

[4] Instead, we are terminating this proceeding, PR Docket No. 88-567, and deferring our decision about whether to apply the conditional licensing concept to alternative frequency coordination methods to PR Docket No. 88-567. This effectively grants the relief APCO seeks (a later decision on the issue), but not by the procedural method APCO seeks (consolidation of two proceedings).

[5] 47 C.F.R. § 90.127.

[6] 47 C.F.R. §§ 90.175 and 90.176.

[7] These six conditions are enumerated in Section 90.159(b) of the Rules, 47 C.F.R. § 90.159(b).

[8] 4 FCC Rcd at 8288, n. 2.

[9] *Id.* at 8281.

[10] Joint Petition for Reconsideration of API and SIRSA at 10-14; Petition for Partial Reconsideration of NABER at 5-8; Petition for Reconsideration of APCO at 4-20; Comments in Support of APCO's Motion to Consolidate filed by MRFAC at 2 (note 1); and Comments of Hewlett-Packard Company Medical Products Group on Petitions for Reconsideration at 2-3.

Commission or any other entity committed to the preservation of overall spectrum efficiency and integrity, posing a serious risk of interference to existing licensees. Alternatively, APCO's Petition for Reconsideration was accompanied by a Motion to Consolidate our frequency coordination and conditional licensing rule making proceedings so that we could consider the propriety of conditional operation by direct access applicants.

III. DISCUSSION

A. Relationship between conditional licensing and alternative coordination methods

7. The Commission's implementation of conditional licensing has received broad-based support from the private land mobile community. Over the past 18 months that conditional licensing has been available as an option on shared frequencies, it appears to have operated successfully without any significant adverse impact upon communications in the private land mobile radio services. Although we stated in our conditional licensing *Order* that we contemplated applying conditional licensing to alternative methods of frequency coordination that were under consideration in PR Docket No. 88-548, we have yet to decide the precise nature of any alternative frequency coordination method, including "direct access." The issue of whether conditional licensing should be available under any of the alternative(s) chosen has been raised by the comments and is a matter of record in PR Docket No. 88-548.[11] The decision on whether conditional licensing should be available for any alternative methods of frequency coordination should therefore be made within PR Docket No. 88-548 based upon the comments filed and the record established on this issue in that: proceeding. Consequently, this *Memorandum Opinion and Order* is not the appropriate vehicle for addressing the propriety of applying conditional licensing to proposed alternative methods of frequency coordination under consideration by the Commission in another proceeding. We therefore dismiss the petitions for reconsideration filed in this proceeding on this issue.

8. The specific rules adopted in the conditional licensing *Order* state that the applicant must satisfy the frequency coordination requirements of Sections 90.175 and 90.176 of the Commission's Rules, 47 C.F.R. §§90.175 and 90.176; there is no reference to any alternative frequency coordination methods. Therefore, prior to the Commission's adopting any new rules in PR Docket No. 88-548, the only way to operate under conditional authority where frequency coordination is required is through a certified frequency coordinator. Because conditional operation cannot occur under alternative frequency coordination methods unless the rules are further modified, there is no need to combine the two proceedings. We are, therefore, dismissing APCO's Motion for Consolidation.[12]

B. Use of conditional licensing in the Railroad Radio Service.

9. As noted above, AAR's petition seeks the exclusion of the Railroad Radio Service from our conditional licensing procedure. In its petition, AAR concedes that conditional licensing might occasionally benefit railroad applicants.[13] It contends, however, that the benefit of earlier commencement of operation under conditional authority is overcome by the potential for interference to existing or proposed facilities.[14] AAR also maintains that although it coordinates railroad applications very closely so that potential problems are minimized or eliminated before the applications reach the Commission, the complexity and nationwide nature of railroad communications systems and their importance to safety militate against the Commission's conditional authorization process.[15]

10. AAR has essentially repeated arguments made in its original comments which were considered and rejected in our *Order*.[16] As we stated in our *Order*, we do not wish to exclude eligibles in any particular land mobile radio service from having the opportunity to take advantage of conditional licensing. We are not persuaded by AAR's expressed concern about interference "potential to existing or proposed stations.[17] AAR's frequency coordination recommendation is still a prerequisite to conditional operation, and we have deferred any decision on whether conditional licensing authority will be available under alternative frequency coordination methods. We conclude, therefore, that AAR's petition should be denied.

IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), and pursuant to Section 1.429(i) of the Commission's Rules, 47 C.F.R. § 1.429(i), that the Joint Petition for Reconsideration filed by the American Petroleum Institute and the Special Industrial Radio Service Association, Inc., and the Petitions for Reconsideration filed by the National Association of Business and Educational Radio, Inc., and the Associated Public Safety Communications Officers, Inc. ARE DISMISSED.

12. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by the Association of American Railroads IS DENIED.

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[11] Comments have been filed supporting various positions on this issue in PR Docket No. 88-548. *See, e.g.*, Comments of Teletech, Inc. and the American Private Radio Association, Inc. (APRA) (favoring conditional operation by direct access applicants). *See also* Comments of the National Association of Business and Educational Radio (NABER) and the Special Industrial Radio Service Association (SIRSA) (opposing conditional operation by direct access applicants).

[12] Thus this issue will not be considered in this proceeding (PR Docket No. 88-567). It will be considered within PR Docket No. 88-548, where it is also a matter of record. Thus, APCO's desire that the Commission make this decision in the context of PR Docket No. 88-548 is realized, although, procedurally, APCO's request to consolidate PR Docket Nos. 88-567 and 88-548 is not granted. As explained in this paragraph, there is no need to continue PR Docket No. 88-567 in open status.

[13] AAR petition at 6.

[14] *Id.*

[15] *Id.* at p.7.

[16] *See* Report and Order, PR Docket No. 88-567, *supra*, at 8284.

[17] In fact, conditional operation may help to identify those rare instances where harmful interference may result prior to the grant of a permanent license. *See Report and Order*, PR Docket No. 88-567, *supra*, at 8283.

13. IT IS FURTHER ORDERED that the Motion to Consolidate filed by the Associated Public Safety Communications Officers, Inc. IS DISMISSED.

14. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Bobby Duffy File No. 860102MI

For Construction Permit
for a New FM Station on Channel 225C
in Anchorage, Alaska

MEMORANDUM OPINION AND ORDER

Adopted: February 14, 1992; Released: March 2, 1992

By the Commission:

1. The Commission has before it a petition for reconsideration filed by Bobby Duffy ("Duffy") of an action by the Mass Media Bureau ("Bureau") dismissing Duffy's application and designating for comparative hearing three other mutually exclusive applicants for Channel 225C in Anchorage, Alaska. *Northland Broadcasters, a Limited Partnership*, 4 FCC Rcd 6508 (M.M. Bur. 1989).[1]

2. Duffy, along with seven other applicants, filed for the Anchorage allotment during the pertinent filing window. Three applicants -- Duffy, Seward Radio, Ltd. ("Seward"), and Abacus Broadcasting ("Abacus") -- specified facilities below the minimum height required for a Class C FM station under 47 C.F.R. § 73.211. Each requested a waiver. However, the Bureau held that:

> Under the immediate circumstances where four of the seven applicants in the instant proceeding have proposed facilities in compliance with the minimum Class C [height above average terrain] requirement, the Commission would be hard pressed to find justification for grant of a waiver. *Compare with Locher Development Corporation*, MM Docket No. 85-280 (Mimeo No. 7344, released October 3, 1985), and *Denali Broadcasting Company, Inc.*, MM Docket No. 85-281 (Mimeo No. 7345, released October 3, 1985). Further, none of the requests for waiver provide any aeronautical and/or topographical evidence casting a substantial doubt as to the viability of all of the four proposals complying with the required minimum....

4 FCC Rcd at 6508.[2] Duffy's waiver request indicated that: (i) the surrounding topography necessitated the construction of an extremely high (1200-foot) tower to comply with the minimum HAAT; (ii) construction of such a tower was uneconomical, construction on a mountaintop is impossible due to inaccessibility, and most of the mountainous area to the south and east of Anchorage is within Chugach State Park and therefore development is restricted by the State of Alaska; (iii) the proposed facility would serve virtually all of the Anchorage population and a tower which would meet the minimum height requirements would extend the proposed signal into nearly unpopulated wilderness, and (iv) the Commission had waived Section 73.211 in Alaska for previous Class C allotments, citing *Locher Development Corporation* and *Denali Broadcasting*, as well as *Arctic Broadcasting Association*, 59 FCC 2d 1273 (1976).

3. In his petition for reconsideration, Duffy contends that the Bureau lacked the authority to reconsider its initial acceptance of Duffy's application because staff actions become final and not subject to reconsideration within 30 days after they are published, citing 47 C.F.R. § 1.113(a). Duffy states that his application was accepted for filing on April 1, 1986,[3] and that action therefore became final on May 1, 1986.

4. Duffy is incorrect in his assertion that the acceptance of an application is a non-reviewable final action. Section 73.3564(b) of the Commission's Rules, 47 C.F.R. § 73.3564(b), states that:

> Acceptance of an application for filing merely means that it has been the subject of a preliminary review by the FCC's administrative staff as to completeness. Such acceptance will not preclude the subsequent dismissal of the application if it is found to be patently not in accordance with the FCC's rules.

Thus, the initial finding of acceptability is a provisional determination. When the Bureau later determined that Duffy's application was not in compliance with Section 73.211 of the Commission's rules and was not supported by a grantable waiver request, the application could properly be dismissed.

5. Duffy's next argument is that he initially proposed the same original site as two other Anchorage applicants,[4] yet his attempt to amend (upon learning "that the FAA would not approve his site") was rejected and his application dismissed, while the other two applicants were designated for hearing with air hazard issues, thus affording them an opportunity to amend and specify a new site. Petition, at pp. 4-5.

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[1] Northland Broadcasters and A.A. Radio Partnership, competing applicants for the Anchorage frequency, each filed an opposition to the petition on October 4, 1989. Duffy filed a reply to A.A.'s opposition on October 16, 1989, which it supplemented on October 19 and December 13, 1989. Duffy thereafter filed a "Motion to Extend Reply Dates to Opposition" on October 24, 1989, which Northland opposed two days later. Finally, Duffy filed a letter with the presiding Administrative Law Judge concerning the status of his petition for reconsideration on May 7, 1990, and a related "Statement for the Record" on June 12, 1990. None of these pleadings, save for the oppositions and Duffy's one reply, are authorized under 47 C.F.R. § 1.45, and those unauthorized pleadings will not be further considered.

[2] One of the four applicants which specified minimum Class C facilities, Seward Radio, Ltd. (File No. BPH-860102MF), was dismissed for an unrelated tenderability defect.

[3] Report No. NA-13 (released April 1, 1986).

[4] KNIK Broadcasting Corporation (File No. BPH-860102MG) and A.A. Radio Partnership, a Limited Partnership (File No. BPH-860102MM).

6. First, we note that both of the applicants who also proposed Duffy's original site specified minimum Class C facilities. Duffy's original proposal specified less than minimum Class C facilities and requested a waiver of Section 73.211. Duffy later amended his application to specify a new transmitter site (that utilized by station KAKM-TV, Anchorage) on April 4, 1986, in response to a letter dated March 7, 1986 from the Commission's Field Operations Bureau which informed Duffy that his original proposal would interfere with the Commission's Anchorage monitoring station. *See* Engineering Statement attached to the April 4 amendment, at p. 1. Thus, Duffy's amendment was not filed in response to an FAA air hazard determination. The Anchorage Hearing Designation Order considers Duffy's amended proposal at the KAKM-TV site. *Northland Broadcasters*, 4 FCC Rcd at 6508. However, because Duffy proposed operation with less than minimum Class C facilities in both his original and his amended proposal, operation from either site would have violated the minimum Class C requirements of Section 73.211 of the rules. Duffy's application was dismissed not because the Bureau rejected his April 4 amendment, but because the amended proposal violated Section 73.211 and no valid justification for waiver was provided.

7. Duffy's next argument is that the Bureau treated applicants "unequally" because none of the three acceptable applicants could be granted without rule waiver, since KNIK and A.A. "are not FAA-acceptable" and one other applicant, Northland Broadcasters, a Limited Partnership, required a waiver of the city coverage rule, 47 C.F.R. § 73.315. Petition, at p. 5. Duffy contends that: (i) the Commission did not do an independent engineering study of his waiver request, as it did for Northland (whose city coverage request was granted) and as it did in *Arctic Broadcasting;* (ii) the Commission erred by faulting Duffy for not showing that the four proposals which comply with Section 73.211 were incapable of effectuation; and (iii) there is no requirement that Duffy submit more to justify his waiver request than he did submit. The agency, claims Duffy, "cannot retroactively require an applicant to do any act, or make any showing, of which the applicant was not aware and could not be aware when it filed its application." Petition, at p. 8.

8. We reiterate that Duffy's application was dismissed, in contrast to the treatment given to other applicants, in accordance with our longstanding FM processing policy. Duffy's application violates one of our core technical acceptance rules, the power and height limitations in 47 C.F.R. § 73.211. In order to be acceptable for filing, FM applicants must comply with all pertinent power/height limitations or range requirements; failure to do so will result in the dismissal of the application. *See Public Notice*, "Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications," FCC 84-366, 49 Fed. Reg. 47,331 (December 3, 1984). *See also* Appendix D, paragraph 4(e) to the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19,936, 19,946 (May 13, 1985), reprinted at 58 RR 2d 166; and *Nan E. Carlisle and Jittendra R. Patel*, 3 FCC Rcd 2530, 2531 (1988). FAA clearance and city coverage deficiencies, on the other hand, do not warrant immediate dismissal. Failure to secure FAA approval or comply with the city coverage requirements will result in designation of an appropriate hearing issue against the applicant in question. *See, e.g., John Lamar Hill*, 58 FCC 2d 1066 (1976); *Lake Erie Broadcasting Co.*, 22 RR 2d 647 (Rev. Bd. 1971); and *Jerry Lawrence*, 30 RR 2d 1529 (Rev. Bd. 1974).[5] Thus, Duffy's application was properly returned, while those of KNIK, A.A., and Northland were properly designated for comparative hearing with appropriate issues.

9. Furthermore, while air hazard issues ultimately were specified against KNIK and A.A., only KNIK's proposal had, in fact, been deemed an "air hazard" by the FAA. A.A.'s proposal had been cleared by the FAA but, consistent with our established cautionary processing policy, A.A.'s application was designated for hearing with an air hazard issue because of a minor discrepancy in the site elevation specified in its application. *Northland Broadcasters*, 4 FCC Rcd at 6509. Formal resolution of the issue merely requires the correction of data filed with the FAA if, in fact, information filed at the FCC was also filed with the FAA. Therefore, the issue was added only to insure correct data on file with the FAA and not because the Bureau believed A.A.'s prior clearance to be in jeopardy.[6]

10. With respect to Duffy's contention that the Commission made special efforts to examine Northland's proposal, and the proposal before it in *Arctic*, but summarily rejected Duffy's proposal without significant analysis, we conclude that Duffy's contentions do not warrant reversal of the Bureau's action. As related in the Hearing Designation Order, "Northland indicated that '[t]he city of Anchorage has boundaries coextensive with the borough of Anchorage. Due to the rugged terrain to the east of the proposed site, 70 dBu coverage of the entire Borough is impossible. However, from the proposed antenna location, line-of-sight exists to all of the Anchorage urban area and a signal level of at least 70 dBu is predicted over the entire urban area.'" 4 FCC Rcd at 6509. Thus, the Bureau simply used the tendered information to verify Northland's city coverage claim, consistent with precedent, and did not engage in any extraordinary analysis of the application. *See, e.g., Richard Culpepper*, 5 FCC Rcd 2893, 2894 (1990). With respect to Duffy's waiver request, the Bureau conducted an analysis, and concluded that the circumstances presented did not justify waiver of Section 73.211. While Duffy may disagree with the analysis, we conclude that the Bureau fully considered the facts before it. Applicants requesting waiver must bear the burden of its justification. With the thousands of applications which must be processed each year, the staff cannot examine the

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[5] The *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19,936 (May 13, 1985), which established the current FM "hard look" processing standards, made no substantive changes to existing policies governing the grantability or acceptability of FM applications. *See, e.g., Teton Broadcasting Limited Partnership*, 1 FCC Rcd 518, 521 n.5 (1986).

[6] On September 21, 1989, A.A. amended its proposal to correct the site elevation figure. The amendment reflected that A.A's site elevation, originally listed as 732 meters AMSL, was actually 760 meters AMSL. The amendment also corrected corresponding engineering parameters, including an increase in antenna height above average terrain of from 387 to 415 meters. By *Order* adopted March 5, 1990, Presiding Administrative Law Judge Tierney granted a Joint Request For Approval of Settlement Agreement filed by the remaining Anchorage applicants and granted A.A.'s application. A construction permit was issued to A.A. on August 7, 1990, expressly conditioned on the outcome of Duffy's appeal.

underlying engineering or economic data to determine whether it would support a waiver independently of the arguments raised by the applicant. *See Columbia Communications Corp. v. FCC*, 832 F.2d 189, 192 (D.C. Cir. 1987), *citing Rio Grande Radio Fellowship, Inc. v. FCC*, 406 F.2d 664, 666 (D.C. Cir. 1968)(per curiam). The Bureau determined, and we agree, that Duffy's showing did not demonstrate that the public interest would be better served by exempting his proposal from the requirements of Section 73.211. *See Arroyo and Fortuno Associates*, 42 RR 2d 607 (1978).

11. Duffy next argues that he was erroneously faulted for not demonstrating that the other four compliant proposals were incapable of effectuation. However, as was pointed out in the Hearing Designation Order, applicants seeking waiver must plead with particularity the facts and circumstances which warrant such action, and give affirmative reasons to justify grant of the waiver in the public interest, citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). Compliance with our core technical rules is presumed to serve the public interest, and it is essential that when a mutually exclusive applicant argues that compliance with these rules is impossible, it must at least raise a substantial and material question of fact concerning the compliant proposals of other in the same proceeding. *See, e.g., Donovan Burke*, 104 FCC 2d 843 (1986), and *Teton Broadcasting Limited Partnership*, 1 FCC Rcd 518 (1986).[7]

12. We also reject Duffy's contention that he should be permitted to downgrade to Class C1 status. Duffy claims that "it is illogical and unfair for the Commission to refuse to allow him the same downgrading rights as incumbent broadcasters." Petition, at p. 12. Duffy cites *Reclassification of FM Facilities Pursuant to BC Docket 80-90*, 2 FCC Rcd 2124 (1987), in which we adopted procedures governing reclassification of *existing* FM stations. In Docket 80-90, the Commission held that all Class C facilities must have an antenna with minimum HAAT of 300 meters. *Modification of FM Broadcast Station Rules*, 94 FCC 2d 152, 156 (1984). We also established new categories of Class C1 and Class C2 stations, which would permit existing stations to operate with less than full Class C facilities. In that proceeding, we specifically considered whether new applicants should be allowed to specify lesser facilities, and concluded that "any group seriously contemplating new Class C service should have good economic support and be able to begin operations with the larger facilities." *Id.* at 178. The *Report and Order* made clear that the C1 and C2 classifications were authorized in recognition of the restrictions and limitations on existing stations and that all new applicants for Class C allotments were required to meet the minimum Class C facility requirements. *See Nan E. Carlisle and Jitendra R. Patel*, 3 FCC Rcd at 2531. Duffy makes no substantive argument for why rules and policies which by their terms apply only to licensees or permittees should also attach to applicants proposing to provide a broadcasting service, and Duffy has demonstrated no public interest reason for downgrading a facility which other applicants propose to construct as a full Class C station.

13. Duffy's final contention is that "equitable considerations" compel grant of his petition. Among these are that: (i) the Commission "owes it to the citizens of Alaska, who have been devastated by economic and ecological crises ... in recent years" to "select among the greatest possible number of applicants," yet it has "deprived Alaskans of half of the otherwise qualified applicants in the proceeding." Petition, at p. 14; (ii) Duffy, an African American experienced in broadcasting, left his career in military service in order to fulfill his integration statement and become a resident owner/operator of the Anchorage station; and (iii) Duffy proposes "to start Anchorage's first Black owned station" and provide programming for a 12,000-member Black community "which is more geographically and socially isolated from the rest of Black America than any other such community." Petition, at p. 17.

14. The Commission's longstanding policy has been to refuse to base waivers of our core technical rules upon non-technical considerations such as those put forth by Duffy. This policy has been approved by the courts. *See, e.g., North Texas Media, Inc. v. FCC*, 778 F.2d 28 (D.C. Cir. 1985); *ICBC Corp. v. FCC*, 716 F.2d 926 (D.C. Cir. 1983). *See also Universal Broadcasting of Indiana, Inc.*, 102 FCC 2d 1547 (1986). Moreover, these "equitable" considerations were not advanced in Duffy's original waiver request. Acceptance of these arguments and reinstatement of Duffy's application would disrupt the orderly functioning of our processing system and would be unfairly prejudicial to those applicants who in this case have complied with the Commission's technical rules. *See Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941).

15. Finally, with respect to Duffy's argument that the Commission should select the Anchorage permittee from among "the greatest possible number of applicants," we must point out that, with the adoption of the "hard look" FM processing guidelines in the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19,936 (May 13, 1985), the Commission recognized that:

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[7] The cases cited by Duffy in support of its argument that compliance with Section 73.211 is contrary to the public interest are inapposite. In *Arctic Broadcasting*, a lone applicant for a Class C frequency in Nome, Alaska, wished to operate with below the required minimum Class C effective radiated power. The Commission granted a waiver of the minimum power requirement based on: (i) the high cost of electricity to provide full power (approximately 12 cents per kilowatt hour) and the need for energy conservation; (ii) the fact that no persons living within 80 miles of Nome would be deprived of 1 mV/m (60 dBu) service by the lower-powered operation, and (iii) the proposed operation would provide a 70 dBu signal to the entire city of Nome, as evaluated by the Commission based on the submitted information. We specifically reject Duffy's argument that only "an insignificant number" (1,405) of additional persons would be served by operation with minimum Class C facilities. Petition, at p. 11. In *Arctic*, there was only one applicant and no indication that over 1000 people would not receive service as a result of a waiver. Thus, grant of Arctic's waiver provides no support for grant of Duffy's waiver request. Furthermore, in *Arctic*, there were no competing applicants demonstrating that compliance with Section 73.211 was, in fact, feasible. In *Locher* and *Denali*, the Bureau waived the minimum HAAT requirements because *all* applicants in those proceedings claimed impossibility and requested a waiver.

> While it is desirable to have as many qualified applicants as possible from which to select a broadcast licensee, "[w]e have recently undertaken to place greater emphasis on providing service to the public in the most efficient, expeditious manner possible. Temporizing with flawed proposals has in the past disserved the public interest by inordinately delaying the initiation of new service. *Chudy Broadcasting Corporation*, 58 RR 2d 133, 134 n.7 (1985).

Star Signal Corporation, 1 FCC Rcd at 450 (1986); *see also Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 410 (1986). Return of Duffy's application for the reasons set forth above is consistent with the Commission's intent to streamline its procedures and make more efficient use of staff and other resources at a time when the Commission was experiencing a large influx of FM applications. *See, e.g., R.A.D. Broadcasting Corp.*, 4 FCC Rcd 4772 (1989).

16. Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed by Bobby Duffy IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-284

In the Matter of

Amendment of Section 73.202(b), RM-7814
Table of Allotments,
FM Broadcast Stations.
(Independence, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 24, 1992; Released: March 4, 1992

By the Assistant Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 6 FCC Rcd 5632 (1991), issued in response to a petition for rule making filed on behalf of Benett Kessler ("petitioner"), permittee of Station KDAY(FM), Channel 292A, Independence, California, proposing the substitution of Channel 223B for Channel 292A and modification of her construction permit to specify the non-adjacent, higher-powered channel. Petitioner filed comments in support of the proposal. Comments were also filed on behalf of Susan Lundborg ("Lundborg"), permittee of Station KDAY(FM), Channel 288A, San Joaquin, California, to which petitioner responded.[1]

2. We believe the public interest would be served by substituting Channel 223B for Channel 292A at Independence, California, since it would provide the community with an expanded coverage area FM service. Therefore, in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we will substitute Channel 223B for Channel 292A at Independence, as requested. Channel 223B can be allotted to Independence consistent with the miniumum distance separation requirements of Section 73.202(b) of the Commission's Rules, at the petitioner's suggested site located 5.2 kilometers (3.3 miles) east of the community.[2] We will not allot Channel 288B to Independence, which was proposed as an additional equivalent channel for use by other interested parties, since no interest in the use of the channel was expressed.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 20, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Independence, California	223B

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the permit of Benett Kessler (BPH-880519MF) for Station KDAY(FM) IS MODIFIED to specify operation on Channel 223B in lieu of Channel 292A at Independence, California, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Benett Kessler, permittee of Station KDAY(FM), is required to submit a rule making fee in addition to the fee required for the applications to effectuate the upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

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[1] Lundborg's comments were not served on the petitioner, in violation of Section 1.420 of the Commission's Rules. *See also* paragraph 4 of the Appendix to the *Notice*. Consequently, Lundborg's comments have not been accepted. As a result, petitioner's responsive comments need not be discussed. In the event Lundborg's comments had been acceptable, they are moot (see paragraph 2, *infra*), as they relate to the alleged preclusive impact consideration that additional equivalent Channel 288B, proposed for the use of other interested parties at Independence, would have on the future modification plans for Station KVPC(FM) at San Joaquin. Nor can we consider Lundborg's comments as a petition for rule making to modify the permit for Station KVPC(FM), since no technical showing was provided to demonstrate that such proposal would comply with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules. *See* Section 1.402(c) of the Commission's Rules. *See also Birmingham, AL*, 7 RR 2d 1649 (1966).

[2] Coordinates at the petitioner's suggested site for Channel 223B are 36-48-56 and 118-08-36.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-353

In the Matter of

Amendment of Section 73.202(b),	RM-7863
Table of Allotments,	
FM Broadcast Stations.	
(Altoona, Wisconsin)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 24, 1992; Released: March 4, 1992

By the Assistant Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 6 FCC Rcd 7212 (1991), proposing the substitution of Channel 251C3 for Channel 251A at Altoona, Wisconsin, and modification of the construction permit (BPH-900517MH) for Station WISM-FM accordingly. The *Notice* was issued in response to a petition filed by Alpenglow Communications, Inc. ("petitioner"). Petitioner filed comments restating its interest in the allotment at Altoona. Phillips Broadcasting Company, Inc. filed comments.[1] Petitioner filed reply comments.

2. We believe the public interest would be served by substituting Channel 251C3 for Channel 251A at Altoona, Wisconsin, in order to provide the community with a wide coverage area station. As indicated in the *Notice*, Channel 251C3 can be allotted to Altoona consistent with the Commission's spacing requirements at petitioner's specified site.[2] We will authorize a modification of petitioner's construction permit for Station WISM-FM, Channel 251A, to specify operation on Channel 251C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 20, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Altoona, Wisconsin	251C3

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Station WISM-FM, Altoona, Wisconsin, IS MODIFIED to specify operation on Channel 251C3 in lieu of Channel 251A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Alpenglow Communications, Inc., permittee of Station WISM-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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[1] Phillips Broadcasting Company, Inc. ("Phillips"), licensee of Station WMEQ-FM, Menominee, Wisconsin, filed comments alleging that Station WISM-FM and two other FM stations are currently causing intermodulation problems to the reception of WMEQ-FM. While Phillips neither supports nor opposes the proposal, it states that if petitioner uses the reference site specified in the *Notice*, it is possible that the interference to WMEQ-FM may disappear or at least be reduced. We need not consider Phillips' comments at this time, as its allegations are unsupported and speculative. Phillips' concerns would be more appropriately considered after petitioner files an application which provides the exact site, power and tower height for Channel 251C3. As indicated above, Channel 251C3 at Altoona conforms to Section 73.207 of the Commission's Rules as a fully-spaced allotment.

[2] The coordinates for Channel 251C3 are 44-43-35 and 91-25-06.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-32

In the Matter of

Amendment of Section 73.202(b), RM-7907
Table of Allotments,
FM Broadcast Stations.
(Blacksburg and Roanoke, Virginia)
and Lewisburg, West Virginia)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: February 24, 1992; Released: March 4, 1992

Comment Date: April 27, 1992
Reply Comment Date: May 12, 1992

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Blacksburg-Christiansburg Company ("petitioner"), licensee of Station WVVV-FM, Channel 285A, Blacksburg, Virginia, requesting the substitution of Channel 287C3 for Channel 285A at Blacksburg and modification of its license to specify operation on the higher powered channel. To accommodate the allotment of Channel 287C3 at Blacksburg, petitioner also requests the substitution of Channel 275A for Channel 288A at Lewisburg, West Virginia, and the modification of Station WKCJ-FM's license accordingly; and the substitution of Channel 285C3 for Channel 287A at Roanoke, Virginia. Petitioner states that it will apply for Channel 287C3 and will also reimburse the licensee of Station WKCJ(FM) for the reasonable costs associated with the change in channel at Lewisburg, West Virginia. Susan D. Brown ("Brown"), permittee of Channel 287A at Roanoke, Virginia, filed comments.[1]

2. We believe the public interest would be served by proposing the substitution of Channel 287C3 for Channel 285A at Blacksburg; the substitution of Channel 275A for Channel 288A at Lewisburg, and the substitution of Channel 285C3 for Channel 287A at Roanoke, since the proposal could provide both the communities of Blacksburg and Roanoke with wide coverage area FM services. Channel 287C3 can be allotted to Blacksburg, Virginia, and Channel 285C3 can be allotted can be allotted to Roanoke, Virginia, in compliance with the Commission's minimum distance separation requirements. Channel 287C3 can be allotted to Blacksburg with a site restriction of 6.2 kilometers (3.9 miles) northwest to accommodate petitioner's desired site.[2] Channel 285C3 at Roanoke will require a site restriction of 8.4 kilometers (5.2 miles) northeast to avoid a short-spacing to Station WDCG-FM, Channel 286C, Durham, North Carolina.[3] As proposed, Channel 275A can be allotted to Lewisburg, West Virginia, in compliance with the Commission's minimum distance separation requirements and can be used at the transmitter site specified in Station WKCJ-FM's license.[4] Therefore, we will direct an *Order to Show Cause* to the licensee of Station WKCJ-FM why its license should not be modified to specify operation on Channel 275A in lieu of Channel 288A. Petitioner will be required to reimburse the licensee of Station WKCJ-FM for the reasonable costs of moving to Channel 275A if this proposal is ultimately adopted.

3. As requested, we shall propose to modify the license of Station WVVV-FM at Blacksburg, Virginia, and Brown's authorization for Channel 287A at Roanoke to specify operation on Channel 287C3 and Channel 285C3, respectively. In accordance with Section 1.420(g) of the Commission's Rules we will not accept competing expressions of interest or require that the petitioner or Brown demonstrate the availability of an additional equivalent channel at Blacksburg, Virginia, or at Roanoke, Virginia.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Blacksburg, Virginia	285A	287C3
Roanoke, Virginia	222C, 235C, 256C, 287A	222C, 235C, 256C, 285C3
Lewisburg, West Virginia	288A	275A

5. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Seneca Broadcasting, Inc., licensee of Station WKCJ-FM, Lewisburg, West Virginia, SHALL SHOW CAUSE why its license SHOULD NOT BE MODIFIED to specify operation on Channel 275A as proposed herein instead of the present Channel 288A.

6. Pursuant to Section 1.87 of the Commission's Rules, Seneca Broadcasting, Inc., may, not later than **April 27, 1992,** file a written statement showing with particularity

[1] Susan D. Brown's application for Channel 287A at Roanoke, Virginia, was granted on July 12, 1991 and affirmed by the Review Board on November 27, 1991. *See* 6 FCC Rcd 7210 (1991). Brown filed comments supporting petitioner's proposal, particularly that part of the petition proposing to upgrade the facilities at Roanoke. Brown states that she will apply for Channel 285C3, if allotted.

[2] The coordinates for Channel 287C3 at Blacksburg, Virginia, are North Latitude 37-16-14 and West Longitude 80-27-39.

[3] The coordinates for Channel 285C3 at Roanoke, Virginia, are North Latitude 37-20-33 and West Longitude 79-53-50.

[4] The coordinates for Channel 275A at Lewisburg, West Virginia, are North Latitude 37-48-17 and West Longitude 80-21-03. Since Lewisburg is located within the protected areas of the National Radio Astronomy Observatory "Quiet Zone" at Green Bank, West Virginia, the licensee of Station WKCJ-FM will be required to comply with the notification requirement of Section 73.1030(a) of the Commission's Rules.

why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Seneca Broadcasting, Inc., to furnish additional information. If Seneca Broadcasting, Inc. raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Seneca Broadcasting, Inc., will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

7. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed Rule Making and Order to Show Cause* to Seneca Broadcasting, Inc., P.O. Box 610, White Sulphur Spring, West Virginia, 24986 (licensee of Station WKCJ-FM).

8. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

9. Interested parties may file comments on or before **April 27, 1992,** and reply comments on or before **May 12, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Mark J. Prak, Esq.
Tharrington, Smith & Hargrove
P.O. Box 1151
209 Fayetteville Street Mall
Raleigh, North Carolina 27602
(Counsel for petitioner)

Julian P. Freret, Esq.
Booth, Freret & Imlay
1920 N Street, N.W.
Suite 150
Washington, D.C. 20036
(Counsel for Susan Brown)

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-349

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments, RM-7862
FM Broadcast Stations.
(Hartselle, Alabama)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 24, 1992; Released: March 4, 1992

By the Assistant Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 6 FCC Rcd 7140 (1991), issued in response to a petition for rule making filed on behalf of Dorsey Eugene Newman ("petitioner"), permittee of Station WYAM(FM), Channel 291A, Hartselle, Alabama, proposing the substitution of Channel 291C3 for Channel 291A and modification of his permit accordingly. Petitioner filed supporting comments. No other comments were received.

2. We believe the public interest would be served by substituting Channel 291C3 for Channel 291A at Hartselle since it could provide the community with an expanded coverage FM service. Therefore, in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the permit of Dorsey Eugene Newman, as requested. As stated in the *Notice*, Channel 291C3 can be allotted to Hartselle consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules at the petitioner's specified site.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 20, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Hartselle, Alabama	291C3

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the permit of Dorsey Eugene Newman for Station WYAM(FM), IS MODIFIED to specify operation on Channel 291C3 in lieu of Channel 291A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Dorsey Eugene Newman, permittee of Station WYAM(FM), is required to submit a rule making fee in addition to the fee required for the applications to effectuate the upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Coordinates at the petitioner's specified site for Channel 291C3 are 34-27-09 and 86-42-27.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-174

In the Matter of

Amendment of Section 73.202(b), RM-7728
Table of Allotments,
FM Broadcast Stations.
(Goliad, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 24, 1992; Released: March 4, 1992

By the Assistant Chief, Allocations Branch:

1. At the request of Alco Communications ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 3658 (1991), proposing the allotment of Channel 240A to Goliad, Texas. Petitioner filed comments stating its intention to apply for channel, if allotted. No other comments were received.

2. We believe the public interest would be served by the allotment of Channel 240A to Goliad, since it could provide the community with its first aural transmission service. Channel 240A can be allotted to Goliad in compliance with the Commission' minimum distance separation requirements with a site restriction of 3.7 kilometers (2.3 miles) west to avoid a short-spacing to the proposed substitution of Channel 241C1 for Channel 241C2 for Station KXGJ-FM, Bay City, Texas.[1] Furthermore, since Goliad is located within 320 kilometers (199 miles) of the U.S.-Mexican border, concurrence of the Mexican government has been obtained for this allotment.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 20, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Goliad, Texas	240A

4. The window period for filing applications will open on **April 21, 1992,** and close on **May 21, 1992.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 240A at Goliad are North Latitude 28-40-23 and West Longitude 97-25-40.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-516

In the Matter of

Amendment of Section 73.202(b), RM-6927
Table of Allotments,
FM Broadcast Stations.
(Hardinsburg, Kentucky)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: February 24, 1992; Released: March 4, 1992

By the Chief, Policy and Rules Division:

1. Before the Commission is a Petition for Reconsideration filed on behalf of Robert M. Mason ("Mason"),[1] permittee of Station WHOX(FM), Channel 282A, Charlestown, Indiana, challenging the *Report and Order* in this proceeding, 5 FCC Rcd 7684 (1990). The *Report and Order* allotted Channel 282A at Hardinsburg, Kentucky, J & J Broadcast Partners ("J & J"), petitioner of the allotment at Hardinsburg, filed a timely opposition to the petition for reconsideration, and Mason filed a timely response to the opposition. No other comments were received.

BACKGROUND

2. The *Notice of Proposed Rule Making* in this proceeding proposed the allotment of Channel 282A at Hardinsburg, Kentucky as that community's second FM service. Mason, as permittee of Channel 282A in Charlestown, Indiana, and HIC Broadcasting, Inc. ("HIC"), licensee of Stations WHIC(AM) and WHIC(FM), Hardinsburg, Kentucky, filed opposing comments. J & J filed consolidated reply comments. After the close of the comment period, Mason filed comments entitled "Response" to J & J's reply comments, and J & J filed a motion to strike the pleading.[2]

3. HIC's opposition to the allotment, which was based on lack of economic support for a competing radio station, was dismissed as irrelevant.[3] Mason's opposition focused on the fact that use of Channel 282A would preclude its Station WHOX(FM), Channel 282A, Charlestown, Indiana, from increasing from a 3 kW to a 6 kW non-directional Class A facility.[4] Mason failed to provide coordinates for a proposed site or engineering analyses demonstrating the feasibility of allotting Channel 256A in compliance with the Commission's Rules. The *Report and Order* dismissed Mason's proposal as being technically deficient, dismissed Mason's late filed comments as untimely, and allotted Channel 282A to Hardinsburg as that community's second FM service.

Petition for Reconsideration

4. Mason's petition for reconsideration argues that the Commission was wrong to refuse to consider his late filed comments and that reconsideration is warranted on this basis alone. Mason argues that the Commission's failure to consider the full record, including his late filed comments, ignores the Commission's obligation to properly determine the public interest benefits of his proposal. Mason claims that the late filed comments contain the technical specifications which support his proposed allotment of Channel 256A to Hardinsburg. Mason also contends that the engineering analysis conducted by the Commission was flawed, in that it utilized different criteria for each proposal.[5] Claiming this to be a comparison of "apples and oranges," Mason holds that fundamental fairness required that both proposals be analyzed under the same criteria.

5. J & J filed a timely opposition to the petition for reconsideration. J & J points out that the engineering analysis provided by the Commission, as well as that provided by J & J, showed that the Mason proposal was not feasible due to a short spacing to a construction permit for Station WSLM(FM), Channel 255B, Salem, Indiana. J & J also notes that Mason's petition still fails to provide sufficient engineering to ensure the requisite city grade coverage from the proposed site for Channel 256A. J & J concludes that since the Mason petition contains no new information, and the engineering was previously analyzed thoroughly in the earlier proceeding, Mason's petition for reconsideration should be denied.

6. Mason's reply to J & J's opposition contends that J & J focuses on unsubstantiated assumptions regarding the ability of Channel 256A to meet the Commission's requirements with respect to spacing and to city grade coverage. Mason argues that the engineering provided in its late filed comments, as well as engineering attached to the petition for reconsideration, show that the proposed allotment of Channel 256A to Hardinsburg meets all of the technical requirements of the Commission. Therefore, Mason contends the *Report and Order* should be reversed and Channel 256A should be allotted to Hardinsburg.

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[1] Public notice of the filing of Mason's petition was given on February 21, 1990. *See* 56 Fed. Reg. 7045.

[2] Commission Rules do not contemplate the filing of comments after the close of the comment and reply comment periods; therefore, Mason's late filed response was not considered and J & J's motion to strike became moot. *See* Commission Rule 1.415(d).

[3] *See Policy Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, 3 FCC Rcd 638 (1988), *recon. denied*, 4 FCC Rcd 2276 (1989).

[4] Mason stated in his comments that he had reached a verbal agreement with other affected stations to enable Station WHOX(FM) to increase power. However, at no time has Mason applied to the Commission for such an increase.

[5] Specifically, Mason claims the staff engineering analysis used the separation requirements of Section 73.207 of the Commission's Rules for Class A 6 kW facilities in reviewing the proposal for Channel 256A, but then used the separation requirements of Section 73.213(c)(1) in the allotment of Channel 282A.

DISCUSSION

7. We agree with Mason's contention that his alternate channel proposal for Hardinsburg should have been examined under the minimum separation requirements of Section 73.213(c)(1) ("old rules") rather than 73.207 ("new rules"). While the *Report and Order* did not specifically state whether the old or new rules had been used, an examination of our analysis indicates that the site restriction refers to new rules spacings. Since Mason's proposal was for an alternate channel assignment involving a petition filed prior to October 2, 1989, it was not a counterproposal and therefore, the old rules should have been applied.[6] However, this does not constitute reversible error, because as explained below (1) Mason failed to provide coordinates in a timely manner; (2) even if the late filed coordinates been accepted, this would have involved disrupting an on going proceeding of another applicant; and (3) Mason offered no sufficient public interest benefits to warrant acceptance of his proposal.

8. Mason contends that we should accept his late filed comments. Section 1.415(d) of the Commission's Rules specifically states that "[n]o additional comments may be filed unless specifically requested or authorized by the Commission." The purpose of the rule is that there must be a point in time when the record is considered complete, so that proper consideration may be given to its contents. The cut-off procedures were attached as an appendix to the *Notice* in this proceeding, and the date specified therein established the date after which no other comments would be accepted. A party who fails to submit available information to the Commission during the appropriate comment or reply period does so to his own detriment.[7] Mason's argument that all of the comments should be considered destroys the purpose of the rule. It is acknowledged that in prior cases we have allowed late filed comments where either the case was uncontested, or where the party submitted a motion for acceptance, and acceptance would assist the Commission in the consideration of a proposal. In this instance, Mason attempts to force the Commission to consider information which Mason had available to him at the time of submitting initial comments but did not deem necessary until the petitioner had filed timely reply comments. Mason submitted his "Response" without a motion for leave to file late comments and without an explanation for the need of these comments. Therefore, that portion of Mason's petition requesting consideration of the entire record, including late filed comments, is denied.

9. Mason's failure to include channel coordinates in a timely fashion created additional problems with his alternate channel proposal. On February 9, 1990, an application was filed by Station WSLM(FM), Channel 255B, Salem, Indiana, for a change in transmitter site. While Mason's original request for use of the alternate channel was received on January 11, 1990, the coordinates for his proposal were not received until March 22, 1990, as part of this late filed pleading labeled "Response." By this time, the application of Station WSLM(FM) was an on going proceeding within the Commission, and Mason's proposal was short spaced to this application by 19.3 kilometers.[8] That application was subsequently granted on August 6, 1990. Under these circumstances, Section 73.208(a) prohibits the Commission from making an allotment that is short spaced to a station authorization. Moreover, Mason's own engineering study, attached to the petition for reconsideration, acknowledges this short spacing without addressing how any change in site might eliminate it.

10. While Commission policy, pursuant to *Andalusia, Alabama,* 49 FR 32201, August 13, 1984, permits preference of a proposed allotment over an application, it is also true that we have made efforts to accommodate applicants. Pursuant to *Andalusia,* when a pending rule making for an FM allotment conflicts with a pending application, the rule making proposal is generally preferred, unless the applicant can make a showing that the request has some overriding public interest benefits. However, when a conflict of this nature arises and it is possible, we have also modified a rule making proposal to specify an alternate site or channel.[9]

11. In this instance we were confronted with balancing the choice between allotting either Channel 282A or Channel 256A to Hardinsburg. Had we allotted Channel 256A to Hardinsburg, it would have required either modification or dismissal of the application filed by Station WSLM(FM) for a change in transmitter site. On the other hand, allotment of Channel 282A at Hardinsburg would block the possibility of future power increases. Two of the potential power increases are purely speculative, as neither of the stations Mason mentions have ever come before the Commission, either with comments or rule making proceedings, to support an alternate channel proposal. Mason's proposed power increase is also speculative as Station WHOX(FM) has never filed an application to increase power. We also note that Mason has not attempted to show any overriding public interest benefit in the alternate channel proposal. It is not Commission policy to allot alternate channels only to protect a future (and therefore, speculative) power increase.[10] Balancing the choices, the allotment of Channel 282A to Hardinsburg, which caused no disruption to any other proceeding, is preferable over the alternate channel proposal, which involved both disruption of Stations WSLM(FM)'s application proceeding and purely speculative power increases.

12. Furthermore, the relief which is requested by Mason's petition for reconsideration is not available. As stated above, we cannot make a short spaced allotment to

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[6] If, however, Mason had filed a counterproposal, it would have been subject to the new rules. *See Amendment of Part 73 of the Rules to provide for an additional FM station Class (Class C3) and to increase the maximum transmitting power for Class A FM stations.* 4 FCC Rcd 6375 (1989).

[7] *See* Section 1.415(d) of the Commission's Rules. *See also* Section 1.429 of the Commission's Rules regarding petitions for reconsideration.

[8] Pursuant to Section 73.213(c)(1), the required minimum separation between a Class A station and a first adjacent Class B station is 105 kilometers. The actual distance between the proposed site of Channel 256A and the applied for site of Station WSLM(FM), Channel 255B, is 85.7 kilometers. This short spacing is too severe to be alleviated by a site restriction of a Class A station.

[9] *See, e.g., Evans and Martinez, Georgia,* 4 FCC Rcd 7926 (1989); *Greenville, Texas,* 6 FCC Rcd 6048 (1991).

[10] *See, e.g., Oxford and New Albany Mississippi,* 3 FCC Rcd 615 (1988) and *Clarendon, Pennsylvania,* 6 FCC Rcd 6053 (1991).

an existing station authorization. IT IS THEREFORE ORDERED, That the Petition for Reconsideration filed by Robert M. Mason IS DENIED.

13. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

14. For further information concerning this proceeding, contact Elizabeth Beaty, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-27

In re Applications of

SOUTHWEST ALLEN COUNTY SCHOOLS (Hereafter "Southwest") Lafayette Township, Indiana Req: 91.1 MHZ, Channel 216A 0.4 kW (H&V), 65 meters — File No. BPED-900215MC

FAITH CHRISTIAN ACADEMY (Hereafter "Faith") Berne, Indiana Req: 91.1 MHz, Channel 216B1 25 kW (H&V), 100 meters — File No. BPED-901203MN

For Construction Permit for a New, Noncommercial, Educational FM Station

HEARING DESIGNATION ORDER

Adopted: February 12, 1992; Released: March 3, 1992

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new, non-commercial, educational FM station.

2. *Faith.* Faith proposes to locate its antenna on the existing tower of WNUY(FM), Berne, Indiana. Our engineering study indicates that Faith failed to address the matter of how it proposes to resolve any RF exposure to workers on its tower. *See* 47 C.F.R. § 1.1307(b). Consequently, we are concerned that Faith may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). *See also, Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. Section 1.1307 states that an EA must be prepared if the proposed operation would cause exposure to workers or the general public to levels of RF radiation exceeding specific standards. Since Faith failed to indicate how workers engaged in maintenance and repair would be protected from exposure to levels exceeding the ANSI guidelines, it will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. *See generally,* OST Bulletin No. 65 (October, 1985) entitled "Evaluating Compliance With FCC-Specified Guidelines For Human Exposure to Radiofrequency Radiation," at 28. Therefore, Faith will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.,* 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.,* 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessment, that Faith's proposal will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted and the presiding judge shall thereafter not consider the environmental effects of the proposal. *See* 47 C.F.R. § 1.1308(d).

3. *Share-Time.* The applicants have not indicated whether an attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfaloon Denver Educational Broadcasting, Inc.,* 43 Fed. Reg. 49560 (1978). In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement among themselves.

4. *Areas and Populations.* Inasmuch as it appears that there would be a significant difference in the size of the areas and populations which would receive service from the proposals, and since this proceeding involves competing applicants for noncommercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University,* FCC 67-673, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available noncommercial, educational FM signals within the respective service areas.

5. The respective proposals are for different communities. Consequently, it will be necessary to determine pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

1. If a final environmental impact statement is issued with respect to Faith in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to

determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine: (a) the number of other reserved channel noncommercial, educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

3. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), the extent to which each of the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants; and whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if either.

7. IT IS FURTHER ORDERED, That pursuant to paragraph 2, above, Faith shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

8. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

9. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

10. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Digital Mobile Communications, Inc. - Pittsburgh — File No. 63500-92-6-BFW

Notice of Apparent Liability for Forfeiture Penalty for Station KNKK875 in the Public Land Mobile Service at Pittsburgh, Pennsylvania

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: February 26, 1992; Released: March 3, 1992

By the Chief, Mobile Services Division:

1. On June 13, 1990, the Commission granted an authorization to Digital Mobile Communications, Inc. - Pittsburgh (Digital) to operate on frequency 931.6375 MHZ at Pittsburgh,' PA. The expiration date of the authorization was June 13, 1991. On June 12, 1991, Digital constructed the facilities and commenced operations. On June 20, 1991, Digital filed FCC Form 489, Notification of Status of Facilities, and also filed a request for reinstatement.

2. Section 22.9(b)(1) of the Commission's rules states:

> *Notification of status of facilities.* (FCC Form 489). When construction has been completed in accordance with the radio station authorization, the licensee shall so notify the Commission using Form 489. Licensees can commence service the day Form 489 is placed in the mail to the FCC.

Therefore, because Digital commenced operation without timely filing FCC Form 489 with the Commission, it is in apparent violation of Section 22.9(b)(1).

3. Section 503(b) of the Communications Act states in pertinent part:

> Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have--
>
> (B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter . . . shall be liable to the United States for a forfeiture penalty.

We find that Digital's failure to file a Form 489 until June 20, 1991, constitutes willful and repeated conduct within the term of the statute.

4. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), 56 Fed. Reg. 37665 (1991), *recon. pending* the base forfeiture amount for failing to file required forms is $30,000. Consistent with this *Policy Statement*, we are adjusting downward the forfeiture to $6,000 because failing to file an FCC Form 489 is a relatively minor violation and because Digital voluntarily disclosed its failure to file the FCC Form 489. We note, however, that there has been an apparent history of past offenses of the same kind by various wholly-owned subsidiaries of Digital's parent corporation, Graphic Scanning Corporation (Graphic). Consequently, we take this opportunity to warn Digital and Graphic in particular and licensees and their parent firms in general that future multiple violations of our rules will not be tolerated and that upward adjustment criteria imposing higher forfeiture amounts will be assessed if similar offenses are discovered in the future.

5. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Sec 503(b) and Section 1.80 of the Commission's rules 47 C.F.R. Sec. 1.80, IT IS ORDERED that Digital Mobile Communications, Inc.- Pittsburgh IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of Six Thousand Dollars ($6,000) for willful and repeated violations of the aforementioned rule. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended.

6. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission within thirty (30) days of the release date of this order, payable to the order of the Federal Communications Commission to: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

GOLDEN EAGLE COMMUNICATIONS, INC. File No. BMPCT-880125KF

For Extension of Time to Construct
Station KCEO-TV, Oroville, CA

GOLDEN EAGLE COMMUNICATIONS, INC. File No. ARN-900625KF
(Assignor)

and

GOLDEN FEATHER
BROADCASTING CORPORATION
(Assignee)

For Assignment of Construction Permit
of Station KCEO-TV, Oroville, CA

MEMORANDUM OPINION AND ORDER

Adopted: January 30, 1992; Released: March 4, 1992

By the Commission:

1. On February 16, 1988, the Chief, Video Services Division, acting pursuant to delegated authority, denied the above-captioned application of Golden Eagle Communications, Inc. (Golden Eagle) for an extension of time to construct Station KCEO-TV, Channel 28, Oroville, California, cancelled its construction permit, and deleted the station's call sign. A petition for reconsideration of that action was subsequently denied on January 4, 1991, at which time the staff also returned as unacceptable for filing the above-captioned application of Golden Eagle for assignment of the construction permit to Golden Feather Broadcasting Corporation (Golden Feather). Subsequently, on August 12, 1991, the Commission denied the applicants' joint application for review of those actions. *Golden Eagle Communications, Inc.*, 6 FCC Rcd 5127 (1991). The Commission now has before it for consideration the September 30, 1991, joint petition for reconsideration of that action, filed by Golden Eagle and Golden Feather, and related pleadings.

2. The background of this case was detailed in our previous decision and need not be reiterated here. At that time we affirmed the staff's conclusion that Golden Eagle had made no progress in the construction of Station KCEO-TV since 1986 and had not demonstrated circumstances beyond its control which prevented construction of the station. In support of their joint petition, Golden Eagle and Golden Feather argue that on May 24, 1991, nearly four months after they filed their application for review, the staff reinstated a previously cancelled construction permit for Station WCEG(AM) in Middleborough, Massachusetts, in allegedly "nearly identical" circumstances. *Letter to John Joseph McVeigh* (MMB, May 24, 1991). Petitioners contend that the staff's action in that case constitutes changed circumstances warranting reconsideration of our August 12, 1991, action.

3. Petitioners' reliance on the Middleborough decision is not dispositive. Our prior action in this proceeding continues to represent the Commission's position on the extension of permits. The staff's action in Middleborough did not follow the Commission's position on this issue, as set out in the Oroville decision from which reconsideration is sought. It is well settled that the Commission is not required to follow divergent actions taken by the staff. *See Amor Family Broadcasting Group v. FCC*, 918 F.2d 960, 962 (D.C. Cir. 1990); *Homemakers North Shore, Inc. v. Bowen*, 832 F.2d 408, 413 (7th Cir. 1987). We do not believe that the staff's action in Middleborough controls the Commission's resolution of this case. Accordingly, the petition for reconsideration IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-55

In the Matter of

Amendment of Part 97	RM-6984	RM-6985
of the Commission's	RM-6986	RM-6987
Rules Concerning the	RM-6988	RM-6989
Establishment of a	RM-6990	RM-6991
Codeless Class of	RM-6992	RM-6993
Amateur Operator License.	RM-6994	RM-6995

MEMORANDUM OPINION AND ORDER

Adopted: February 20, 1992; Released: March 4, 1992

By the Commission:

I. INTRODUCTION

1. On December 13, 1990, the Commission adopted a *Report and Order* (*Order*) in this proceeding[1] that, *inter alia*, established the Technician Class amateur operator license as the codeless class of amateur operator license. The purpose of this *Order* was to offer an entry-level license opportunity to otherwise qualified persons who find a telegraphy requirement an unnecessary barrier to pursuing the purposes of the amateur service. Since the adoption of this *Order*, we have received over sixty letters highly supportive of our decision. We have also received more than forty-five letters informally requesting that we clarify or modify various portions of this *Order*. This *Memorandum Opinion and Order* denies these requests.

II. BACKGROUND

2. The objections to our *Order* generally fall into four areas. A number of letters argue that we should have created a new sixth class of license so that codeless licensees could be readily distinguished from licensees who have passed a Morse code examination.[2] Other letters request that we reconsider the privileges of the codeless Technician Class license.[3] Other letters request that we require stations where the control operator is a codeless Technician Class licensee to use a distinctive suffix after the station's call sign when the station is transmitting on the high frequency bands.[4] A few letters still dispute the need for a codeless license in any form.[5] The American Radio Relay League, Inc. (*League*), while not requesting reconsideration of our *Order*, made a number of general comments and pointed out a minor error in footnote 33 of the *Order*.[6]

III. DISCUSSION

3. Section 1.429 of the Rules, 47 C.F.R. § 1.429, governs the filing of petitions for reconsideration in rule making proceedings. That section requires that petitions for reconsideration must show changed facts or circumstances, or facts that were unknown to the petitioner until after the petitioner's last opportunity to present them to us. None of the letters we have received meet the standards of a petition for reconsideration. The letters fail present any facts or raise any issue that we did not consider in the *Order*. For example, we found that the addition of a sixth class of license, as requested again, is neither desirable nor achievable without unacceptable effects upon our workload. Further, we determined that our present computer system will not support six classes of licenses without new and significant expenditures of resources.[7] We also addressed questions about the examination requirements and frequency privileges of the codeless Technician Class license. We concluded that the existing question pools for Elements 2 and 3(A) should contain questions that test whether an examinee has the requisite qualifications to perform properly the operator duties at an amateur station transmitting exclusively above 30 MHz.[8]

4. We also decided that our call sign assignment policy would be inconsistent if we required a station controlled by a Technician Class licensee who also has a Certificate of Successful Completion of Examination (CSCE) for a

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[1] 5 FCC Rcd 7631 (1990).

[2] Letter from Alice Oviatt-Lawrence to Chief, Private Radio Bureau (January 3, 1991), letter from William F. Wiggins to Director (sic), Federal Communications Commission (January 5, 1991), letter from J. Rick Sohl to Secretary, Federal Communications Commission (January 22, 1991).

[3] Letter from Miles Carter to Federal Communications Commission (March 12, 1991), letter from Ben Polasek to Federal Communications Commission (January 18, 1991), letter from Bobby G. Moon to Federal Communications Commission (December 19, 1990), letter from Joe A. Taylor, League Assistant Division Director, to Commissioners (January 3, 1991).

[4] Letter from G. Warren Coleman to Secretary, Federal Communications Commission (February 16, 1991), letter from David B. Vaughan to Federal Communications Commission (not dated), and letter from G. Wayne Marsh to Federal Communications Commission (not dated).

[5] Letter from William C. Wells to Federal Communications Commission (December 27, 1990), letter from Ken Hough to Chief, Personal Radio Branch (January 14, 1991), letter from Clifford English to Federal Communications Commission (December 14, 1990).

[6] Letter from the Office of the General Counsel, American Radio Relay League, Inc. to Chief, Private Radio Bureau (February 19, 1991). The League requests that we correct the frequency segment in the 23 centimeter band that is authorized to Novice Class licensees. We agree the phrase "the entire 23 centimeter band" should be corrected to read "1270-1295 MHz" in footnote 33 of the text. Paragraph 6 below makes this correction.

[7] *See Order* at para. 21-22.

[8] *Id.* at para. 23, 27.

telegraphy element to append an indicator to the station call sign when identifying. This requirement, if we had adopted it, would have caused stations of codeless Technician Class operators to be identified with shorter call signs than stations of other Technician Class operators who have passed more examination elements and have more privileges.[9] The *Order* also addressed the need for a codeless class of amateur operator license. The comments clearly confirmed that the amateur community is undergoing a dramatic shift in sentiment concerning the value of Morse code as an entry level license requirement. We also found that for the amateur service to achieve its purposes, the participation of as many qualified persons as possible who desire to pursue those purposes is needed.[10]

IV. ORDERING CLAUSES

5. In view of the foregoing, and pursuant to the authority contained in 47 U.S.C. § 154(i), IT IS ORDERED that the letters requesting modification of the Commission's decision ARE DENIED except as indicated herein.

6. IT IS FURTHER ORDERED that footnote 33 of the *Order* IS CORRECTED by changing the phrase "the entire 23 centimeter band" to "1270-1295 MHz".

7. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

8. For further information concerning this *Memorandum Opinion and Order* contact William T. Cross, Private Radio Bureau, (202) 632-4964.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[9] *Id.* at para. 38.
[10] *Id.* at para. 8-16.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 3866
Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: February 26, 1992; Release: March 4, 1992

By the Chief, Common Carrier Bureau:

1. On February 13, 1992, AT&T Communications (AT&T) filed the captioned tariff revisions which became effective February 25, 1992 on 12 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing modifies Transmittal 3860 which was filed on February 11, 1992 and which also became effective on February 25, 1992 pursuant to 14 days' notice. There were no petitions filed against Transmittal 3860.

2. On February 20, 1992, the Competitive Telecommunications Association (Comptel) filed a petition to reject or, in the alternative, to suspend and investigate Transmittal No. 3866.

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 3866 and Comptel's petition. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to reject or, in the alternative, to suspend and investigate AT&T Communications Tariff F.C.C. No. 12, Transmittal No. 3866, filed by the Competitive Telecommunications Association IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, *Report and Order*, FCC 91-251, released Sep. 16, 1991 (*IXC Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-197

In re Applications of

KENNETH OSBORNE File No. BPH-891219MI

HOBART C. JOHNSON File No. BPH-891227MG

For Construction Permit for a
New FM Station on Channel 298A
in Virgie, Kentucky

Appearances

Lauren A. Colby, Esquire, on behalf of Kenneth Osborne; *Howard J. Barr, Esquire*, on behalf of Hobart C. Johnson; *James W. Shook, Esquire*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE ARTHUR I. STEINBERG

Issued: February 25, 1992; Released: March 5, 1992

PRELIMINARY STATEMENT

1. By *Hearing Designation Order*, 6 FCC Rcd 4512 (1991) ("*HDO*"), the Chief, Audio Services Division, designated for consolidated hearing the mutually-exclusive applications of Kenneth Osborne ("Osborne") and Hobart C. Johnson ("Johnson") for a construction permit for a new FM station on Channel 298A at Virgie, Kentucky. The hearing issues specified in the *HDO* were as follows:

> 1. If a final environmental impact statement is issued with respect to Osborne and Johnson in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposals are consistent with the National Environmental Policy Act, as implemented by 47 CFR Sections 1.1301-1319.
>
> 2. To determine which of the proposals would, on a comparative basis, better serve the public interest.
>
> 3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

2. By *Memorandum Opinion and Order*, FCC 92M-250, released February 26, 1992, Issue 1 was deleted at the request of the Assistant Chief, Audio Services Division, Mass Media Bureau.

3. A prehearing conference in this proceeding was held on September 26, 1991. A hearing was held on December 16, 1991. The record was closed on December 16, 1991. (Tr. 113; *Order*, FCC 91M-3462, released December 18, 1991.)

4. Proposed findings of fact and conclusions of law were filed by Osborne and Johnson on January 22, 1992. Reply findings were filed on January 31, 1992.

FINDINGS OF FACT

Kenneth Osborne

5. *Structure and Integration*. Osborne is an individual applicant. (Osborne Ex. 1, p. 1.) Osborne proposes to work full time, a minumum of 40 hours per week, as general manager. Osborne will supervise all aspects of the station's operations, including the overall supervision of the station's sales, programming, engineering and clerical departments, personal direction of the station's relations with the community and with advertisers, the hiring and firing of all personnel, and the establishment of salaries. Osborne will also administer the station's EEO program. (*Id.*, at p. 4.)

6. Osborne was a partner (with his mother) in Osborne Auto Sales, a used car business, where he worked part-time at the time of the hearing. Osborne Auto Sales went out of business as of December 31, 1991. Osborne is presently employed as a part-time sports commentator for Stations WRAU, Elkhorn City, Kentucky, for approximately three hours per week, and WLSI, Pikeville, Kentucky. (Osborne Ex. 1, p. 1; Tr. 48.) In the event he is awarded the construction permit, Osborne proposes to terminate his present employment at Osborne Auto Sales and Stations WRAU and WLSI, prior to going on the air with the new FM station at Virgie. (Osborne Ex. 1, pp. 1-2.)

7. Since 1972, Osborne has resided in Robinson Creek, Kentucky, which is approximately six miles from Virgie and within the service area of the proposed station. From birth (1944) until 1954, Osborne resided in Virgie and then Ellwood, Kentucky. From 1954 to 1966, Osborne resided in Robinson Creek, Kentucky, which is within the proposed service area. If granted the construction permit, Osborne will continue to reside within the service area of the proposed station. (Osborne Ex. 1, p. 1.) From approximately June 1989 to May 1990, Osborne has been a member of the Pike County Chamber of Commerce. (*Id.*, at p. 2.)

8. From 1957 to 1989 Osborne was employed by Osborne TV Cable, a CATV system in Robinson Creek, Kentucky, which was founded in 1957 by his father. From 1957 to 1966, while in school, and from 1966 to 1970, Osborne was employed part-time at Osborne TV Cable doing construction, installation, disconnects, general maintenance, repairs and collections. In 1970, Osborne became owner and general manager of the system. From 1965 to 1981, Osborne was employed part-time by Smith TV Cable, Little Creek, Kentucky, doing construction, installation, disconnects, general maintenance, repairs and collections. From 1982 to 1986, Osborne was sole proprietor and manager of Cable TV Associates, Little Creek, Kentucky. (Osborne Ex. 1, pp. 2-3.)

9. From March 1989 to March 1990, Osborne was an officer, director and shareholder of White Water Broadcasting, Inc., and served as general manager of WBPA(AM) and WECL(FM), Elkhorn City, Kentucky. (Osborne Ex. 1, 3; Tr. 41-42.)[1] As general manager, Osborne supervised all aspects of the station's operations, and was responsible for sponsoring and/or the live coverage of community affairs. Osborne also participated in sales (including contracts, copy and production); collections; and cutting spots and dubbing commercials. Osborne further participated as disc jockey; in news gathering and reporting; doing remotes (engineering and live broadcasts); and sports coverage and reporting on the air. Osborne was partially responsible for the securing and production of public service announcements; hosted public affairs programs on the air; and made minor repairs to equipment. (Osborne Ex. 1, pp. 3-4.)

10. From March 1990 to May 1990, Osborne was general manager at WBPA/WRAU, Elkhorn City, Kentucky; and from May of 1990 to the present, Osborne has been a part-time sports commentator at WRAU and WLSI, Pikeville, Kentucky. (Osborne Ex. 1, p. 4.) From approximately June 1989 to May 1990, Osborne was a member of the National Association of Broadcasters, and a member of the Kentucky Association of Broadcasters. (*Id.*, at p. 2.) In connection with the latter membership, Osborne attended seminars. (Tr. 31.)

11. *Diversification.* Osborne has no other broadcast interests. Osborne is presently employed as a sports commentator at Stations WRAU, Elkhorn City, Kentucky, and WLSI, Pikeville, Kentucky, which positions he will terminate if granted the construction permit herein. (Osborne Ex. 2.)

12. *Auxiliary Power.* Osborne will install and utilize auxiliary power generating equipment at both his studio and transmitter sites for the purpose of providing continuous service to the community and the station's service area in the event of a power outage or other emergency. (Osborne Ex. 3.)

Hobart C. Johnson

13. *Structure and Integration.* Johnson is an individual applicant. Johnson proposes to work full time, a minimum of 40 hours per week (excluding a 1 to 2 week vacation each year), as general manager. Johnson will be responsible for all policy decisions including, but not limited to: supervision of all employees, including ultimate hiring and firing authority; supervision of advertising and sales; overseeing community and civic involvement; consulting with the station's technical engineer; monitoring the station's programming and news broadcasts; and general financial management. (Johnson Ex. 1, p. 1.)

14. Johnson stated in his written direct case that he devotes approximately 10 hours per week to his law practice; approximately 10 hours per week to Commonwealth Travel Agency of Pikeville, Kentucky, Inc. ("Commonwealth"), of which he is the sole owner; and less than 2 hours per week to Virgie Hardware ("Hardware") of which he is the sole owner. Johnson further stated in his written direct case that he is also the president and sole owner of Governor Elkhorn Coal Co., Inc. ("Elkhorn"), and presently devotes approximately four to six hours per week to this company. (Johnson Ex. 1, p. 3.)[2] On cross-examination, Johnson admitted that he currently works 40 to 50 hours per week. (Tr. 97.)

15. Johnson also owns two other companies, Martin Mining and Bluegrass Augers, Inc., which he claims are inactive. (Tr. 78, 85.) He has one obligation remaining with Martin Mining in the form of a $10,000 reclamation bond, for which Johnson is personally liable. (Tr. 89.) Johnson has also "devoted a lot of attention and time getting loose" from Bluegrass Augers' reclamation bonds. (Tr. 97.) A reclamation bond guarantees or insures that any surface disturbance caused by the mining will be repaired and the land will be restored to its original contour. (Tr. 83-84.) The bond can be forfeited if the land is not restored (Tr. 84), but forfeiture proceedings, such as hearings, would be required (Tr. 100). Johnson has never forfeited on a reclamation bond. (Tr. 90.) Companies can be hired to do the reclamation work. (Tr. 101.)

16. In his written direct case, Johnson stated he is in the process of phasing out his law practice. He has accepted no new clients or cases in his law practice for the past three to four years, with one exception as a favor to a friend. He anticipates having the practice closed within one year, depending on the one case he accepted for his friend. Johnson expects this case to go to trial in the spring of 1992, which will end his involvement in the case and his law practice. (Johnson Ex. 1, p. 4.) In a pre-designation amendment signed by Johnson on April 19, 1990, Johnson also stated that he had accepted no new clients or cases in his law practice for the past three to four years, that he was in the process of phasing it out, and that he anticipated having the practice closed within one year. (Tr. 61-62.) As of the date of the hearing, Johnson still had his law office. (Tr. 63.) Johnson did not make much profit from his law office in 1991. (Tr. 109.)

17. Commonwealth has two employees (one additional part-time as needed), one of whom is the manager. The manager has more than 15 years experience in the industry. He currently has a large measure of responsibility for this office and will be assigned total responsibility for the operation thereof in the event Johnson is awarded the construction permit. (Johnson Ex. 1, p. 5.) In 1990, Commonwealth had income before expenses of $69,809 (Tr. 93), with a profit of less than $10,000 (Tr. 106). The company was on approximately the same pace in 1991, and Johnson expects approximately the same in actual earnings (Tr. 93, 107).

18. Hardware has two employees, one of whom is the manager. The manager is experienced and currently has, and will continue to have, total responsibility for the operation of the hardware store. (Johnson Ex. 1, p. 5.) Between January 1 and September 1, 1991, Hardware had gross revenues of $50,314. (Tr. 93.) Actual earnings were approximately $10,000 to $15,000 in 1990. Johnson expects to break even in 1991. (Tr. 107.) Hardware has continually "lost ground" over the last five or six years and will probably collapse of its own weight in the next year or so. (Tr. 108.)

19. Johnson has been phasing out Elkhorn. (Johnson Ex. 1, p. 3.) In the past, this company primarily operated a small coal processing plant and loading facility. The company had no production of its own. The company is now inactive and Johnson has no plans to restart operations. (*Id.*, at p. 4.) Elkhorn has one employee and one part-time bookkeeper. The one full time employee, Larry Barnett, is the foreman/superintendent, and is in the process of selling off the company's equipment. (*Id.*; Tr. 90.) Barnett is highly qualified and trusted implicitly by Johnson. Barnett currently has a large measure of responsibil-

ity for the operations/shut down of this company. Johnson proposes to turn over to Barnett complete responsibility for the remaining operations/shut down of this company in the event he is awarded the construction permit. (Johnson Ex. 1, p. 4.) Elkhorn had total sales in 1990 of $626,809. (Tr. 91.) The company, however, did not make any money in 1990. (Tr. 105-6.) The company had less in total sales in 1991 and Johnson anticipates that the company will lose money in 1991. (Tr. 92, 106.) Johnson is personally liable on two reclamation bonds for Elkhorn in the sum of $10,000 each. (Tr. 84, 90.)

20. Johnson proposes to reduce and/or eliminate entirely his current responsibilities in these businesses in order to effectuate his integration proposal. (Johnson Ex. 1, pp. 3-4.) Johnson foresees nothing to prevent him from turning over his responsibilities in these businesses to those employees who are currently running them. (Tr. 108.)

21. Johnson is a lifelong resident (since 1931) of Virgie, except for periods spent away to further his education (1948-52 and 1956-58) and to serve in the military (1952-56). (Johnson Ex. 1, pp. 1-2.) Johnson's civic activities include membership in the Chamber of Commerce for approximately 10 years (but not continuously). Johnson was appointed to the Pikeville Methodist Hospital Board of Directors, Pikeville, Kentucky, in June 1991. In addition, Hardware has sponsored a Little League basketball team for approximately 10 years. (*Id.*, at 2.)

22. Between the late 1960's and the late 1970's Johnson owned stock in the licensees of WPKE-AM/WDHR-FM, Pikeville, Kentucky (15 percent); WNVL-AM, Nicolasville, Kentucky (20 percent); and WVKY-AM, Louisa, Kentucky. (Johnson Ex. 1, p. 3; Tr. 70-71.) Johnson was an officer and director of each licensee corporation, established station policy, and directed supervision of the management personnel of each licensee corporation. Johnson handled day-to-day matters which arose, including personnel matters. (Johnson Ex. 1, p. 3.) Johnson and another individual did the legal work for the station. (*Id.*; Tr. 68.) Johnson visited the stations during the period of his ownership, but not on a day-to-day basis. (Johnson Ex. 1, p. 3.) He also tried to influence advertising prospects to use the radio stations. (Tr. 69, 105.) Johnson never did an air shift, did not speak over the facilities of the stations on a regular basis, never held an operating title such as general manager or program director, has no FCC operator's license, and has never done transmitter repair work at any of these stations. (Tr. 68-70.)

23. In the mid-1980's, Johnson applied for and received a construction permit for a television station at Pikeville, Kentucky. He later assigned the permit to a corporation in which he held a 75 percent interest. That permit was eventually surrendered for cancellation. (Tr. 75-77.)

24. *Diversification.* Johnson has no ownership interest in nor any connection with any medium of mass communications. (Johnson Ex. 1, p. 5.)

25. *Auxiliary Power.* Johnson will maintain auxiliary power facilities at the transmitter site and studio site in order to maintain service in the event of an interruption of electrical service (Johnson Ex. 1, p. 5.)

CONCLUSIONS OF LAW

26. This case must be decided on the comparative issue which is governed by the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). In the policy statement, the Commission established two primary objectives toward which the process of comparison should be directed: (a) maximum diffusion of control of the media of mass communications (the diversification criterion); and (b) the best practicable service to the public (the integration criterion). *Policy Statement*, at 394.

27. *Diversification.* Neither Osborne nor Johnson holds any attributable media interests. Therefore, diversification is not a factor in the comparative evaluation of the applicants.

28. *Auxiliary Power.* Since both applicants propose to install auxiliary power equipment at their studio and transmitter sites, neither is to be preferred on this basis.

29. *Integration.* Both Osborne and Johnson seek 100 percent integration credit, claiming that they will work a minimum of 40 hours per week at their proposed stations. However, only Osborne is entitled to such credit. For the reasons which follow, Johnson is not entitled to any credit for integration.

30. It is well established that the burden of proving entitlement to full-time and/or part-time integration credit is on the applicant. *Cuban-American Limited*, 5 FCC Rcd 3781, 3785 (1990). More particularly as it pertains to this proceeding, Johnson was required to set forth a specific credible plan for accommodating his outside business interests with his plan for full-time integration, including a detailed accounting of the duties and time spent on such activities. Such a showing is necessary because the very existence of outside interests renders an applicant's commitment questionable. *Naguabo Broadcasting Company*, 6 FCC Rcd 4879, 4880 (1991), and cases cited therein. Johnson has failed to meet his burden.

31. Johnson has at least six other business interests. He does not propose to divest any of them but makes a general promise to reduce and/or eliminate his activities therein in order to effectuate his integration pledge. Johnson has made no commitment to reduce his outside activities to any specific number of hours per week, nor has Johnson set forth any specific proposal or timetable for a reduction of the hours he currently works. Johnson's generalized promise to diminish the time he spends on such significant[3] business interests is insufficient to entitle him to any integration credit. *Leininger-Geddes Partnership*, 2 FCC Rcd 3199 (Rev. Bd. 1987), *rev. denied*, 3 FCC Rcd 1181 (1988).

32. Moreover, even assuming *arguendo*, that Johnson's proposal is considered specific enough to pass muster, his claims regarding the amount of time he currently spends on his various businesses, as well as his ability to reduce that time, lack credibility. In his written direct case exhibits, Johnson stated that he has been working approximately 26 to 28 hours per week on his various activities. However, on cross-examination, Johnson admitted that he currently works about 40 to 50 hours per week. This significant discrepancy was never explained. In this connection, Johnson contended that the employees of Commonwealth, Hardware, and Elkhorn currently have total or a large measure of responsibility for running those businesses, and they will be given total responsibility if he is awarded the construction permit. In other words, the same people that are proposed to operate Commonwealth,

Hardware, and Elkhorn are currently running those enterprises. Yet it appears that Johnson still works 30 to 40 hours per week, presumably on those activities.[4] Consequently, Johnson's statement that he will be able to reduce and/or eliminate his responsibilities with these activities by turning them over to the employees who are currently operating them is not believable. Similarly, Johnson's representations about the phasing out of his law practice are not credible. Suffice it to say, Johnson made an almost identical representation 21 months prior to the hearing but the law practice was still active as of the latter date. Under all of these circumstances, Johnson warrants no credit for integration.

ULTIMATE CONCLUSION

33. Neither Osborne nor Johnson has been charged with a diversification demerit. Therefore, they are on an equal footing under the diversification criterion. Similarly, neither applicant is to be preferred on the basis of auxiliary power. However, under the best practicable service criterion, only Osborne is entitled to any integration credit. Consequently, Osborne's application will be granted.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules, the application of Kenneth Osborne (File No. BPH-891219MI) for a construction permit for a new FM station on Channel 298A in Virgie, Kentucky, IS GRANTED, subject to the following condition:[5]

> Kenneth Osborne shall divest himself of all interests in and sever all connections with Station WRAU(FM) prior to the commencement of program test authority.

IT IS FURTHER ORDERED that the application of Hobart C. Johnson (File No. BPH-891227MG) IS DENIED.[6]

FEDERAL COMMUNICATIONS COMMISSION

Arthur I. Steinberg
Administrative Law Judge

FOOTNOTES

[1] The call letters of WECL(FM) were changed to WRAU(FM). (Tr. 43.)

[2] Prior to November 1991, Johnson was devoting approximately 10 to 12 hours per week to Elkhorn. (Johnson Ex. 1, p. 3.)

[3] Johnson's contention that his other business interests are not significant or substantial is rejected. *See Naguabo Broadcasting Company*, 6 FCC Rcd 912, 924 n.63 (Rev. Bd. 1991).

[4] This figure, 30 to 40 hours per week, has been calculated by deducting the 10 hours per week Johnson claims to be devoting to his law practice from the 40 to 50 hours per week Johnson states he works.

[5] *See HDO*, at paras. 3 and 9.

[6] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d) of the Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-311

In the Matter of

Amendment of Section 73.202(b), RM-7828
Table of Allotments,
FM Broadcast Stations.
(Felton, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 25, 1992; Released: March 5, 1992

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 6 FCC Rcd 6119 (1991), issued in response to a petition filed on behalf of W. Robert Morgan ("petitioner") proposing the allotment of FM Channel 229A to Felton, California, as its first local aural transmission service. Petitioner filed supporting comments. No other comments were received.

2. Although Felton (pop. 4,564),[1] is listed in the 1980 U.S. Census as a census designated place, that listing is not sufficient to demonstrate community status for allotment purposes where the traditional components the Commission commonly associates with such status may be missing.[2] Therefore, petitioner was requested to provide demographic information to demonstrate whether Felton contains any commercial establishments, social, economic, cultural or religious organizations, municipal services, or governmental entities that identify themselves specifically with that locality.

3. In response to the *Notice*, petitioner advises that Felton contains numerous business establishments,[3] restaurants, the Felton Business Association, medical and dental facilities, six churches, a post office, library, a weekly newspaper, a volunteer fire department, and a Chamber of Commerce.[4] Additionally, petitioner advises that Felton is served by a high school, a junior high, an elementary school, a pre-school and a day care facility. Also, petitioner states that Felton has its own water and trash services provided by Citizens Utilities.

4. Based upon the above, we believe that the Census listing, in conjunction with the information provided by the petitioner, sufficiently demonstrates that Felton qualifies as a community for allotment purposes. Therefore, we believe the public interest would be served by allotting Channel 229A to Felton since an interest has been expressed in providing a first local aural transmission service to the community. As stated in the *Notice*, Channel 229A can be allotted to Felton consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, provided the transmitter is located at least 11.7 kilometers (7.3 miles) northwest of the community[5] to avoid short-spacing to Station KHIP(FM), Channel 228A, Hollister, California.[6]

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 20, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

City	Channel No.
Felton, California	229A

6. The window period for filing applications on Channel 229A at Felton, California, will open on **April 21, 1992,** and close on **May 21, 1992.**

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Population figure was taken from the 1980 U.S. Census.
[2] *See Searles Valley, CA*, 3 FCC Rcd 5221 (1988); *see also Naples, FL*, 41 RR 2d 1549 (1977).
[3] Petitioner offers that should additional information be required to substantiate his proposal, he is prepared to offer numerous photographs depicting Felton's business and recreational areas.
[4] Petitioner advises that the San Lorenzo Valley Chamber of Commerce attributes Felton with a current population of 5,991, representing a 31% increase since 1980.
[5] Coordinates used for Channel 229A at Felton are 37-06-17 and 122-11-10.
[6] Coordinates at the licensed site of Station KHIP(FM) are 36-45-23 and 121-30-05.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-27

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Castle Rock, Washington)	RM-7549

ORDER OPENING FILING WINDOW

Adopted: February 25, 1992; Released: March 5, 1992

By the Assistant Chief, Allocations Branch:

1. On its own motion, the Commission issued an *Order Staying Filing Window* (DA 91-960), released August 2, 1991, staying the opening of the filing period for Channel 296C3 at Castle Rock, Washington. Both the allotment and filing window were established in the *Report and Order*, 6 FCC Rcd 3366 (1991).

2. At the time the Commission sought comments on the Castle Rock allotment, the Commission also had pending before it the request of Michael T. McKenna to allot Channel 297C3 to Ilwaco, Washington. Ilwaco and Castle Rock are located 87.8 kilometers apart, while the Commission Rules require a 99 kilometer minimum distance separation for first-adjacent Class C3 allotments. The Ilwaco petition was not considered as a counterproposal to Castle Rock because the staff found that a site restriction of 12.7 kilometers (7.9 miles) west of Ilwaco could be imposed to avoid the conflict. *See* 6 FCC Rcd 2460 (1991). However, the Ilwaco site restriction placed the allotment off shore. Thus, the allotments were in conflict. Therefore, because the Ilwaco petition was timely filed to be considered with the Castle Rock proposal, we stayed the opening of the filing window to allow for further consideration of the two proposals.

3. An additional Commission engineering analysis reveals that Channel 280C3 can be allotted to Ilwaco in lieu of Channel 297C3, thereby permitting the allotment of Class C3 channels to both Castle Rock and Ilwaco, Washington. We are allotting Channel 280C3 to Ilwaco in a *Report and Order* in MM Docket No. 91-130, adopted simultaneously with this proceeding. Therefore, it is no longer necessary to stay the filing window for Channel 296C3 at Castle Rock.

4. Accordingly, IT IS ORDERED, That the window period for filing applications for Channel 296C3 at Castle Rock, Washington, will open on **April 27, 1992,** and close on **May 27, 1992.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-130

In the Matter of

Amendment of Section 73.202(b), RM-7593
Table of Allotments,
FM Broadcast Stations.
(Ilwaco, Washington)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 25, 1992; Released: March 5, 1992

By the Assistant Chief, Allocations Branch:

1. At the request of Michael T. McKenna ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 2460 (1991), proposing the allotment of Channel 297C3 at Ilwaco, Washington, as its first local aural transmission service. Petitioner filed comments in support of the proposal reaffirming his intention to apply for the channel, if allotted.[1]

2. After the comment period closed, a Commission staff engineering analysis indicated that the site restriction for Channel 297C3 proposed in the *Notice* would place the allotment off shore. However, our engineering analysis also revealed that Channel 280C3 could be allotted in full compliance with our rules. Therefore, we believe the public interest would be served by the allotment of 280C3 to Ilwaco, since it would provide the community with its first local aural transmission service. Channel 280C3 can be allotted to Ilwaco in compliance with the Commission's minimum distance separation requirements with a site restriction of 3.3 kilometers (2.0 miles) north to avoid a short-spacing to Station KIIL-FM, Channel 281C3, Tillamook, Oregon.[2] Concurrence of the Canadian government has been obtained, since Ilwaco is located within 320 kilometers (200 miles) of the U.S. -Canadian border.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 20, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Ilwaco, Washington	280C3

4. The window period for filing applications for Channel 280C3 at Ilwaco will open on **April 21, 1992,** and close on **May 21, 1992.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Informal comments were also received by Cowlitz Broadcasting Company opposing the proposed allotment of Channel 297C3 at Ilwaco because of a short-spacing to the allotment of Channel 296C3, Castle Rock, Washington. However, these comments need not be addressed, given our resolution in this proceeding.

[2] The coordinates for Channel 280C3 at Ilwaco are North Latitude 46-20-22 and West Longitude 124-02-51.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-535

In the Matter of

Amendment of Section 73.202(b),	RM-7520
Table of Allotments,	RM-7633
FM Broadcast Stations	
(Bowling Green & Elizabethtown,	
Kentucky, and Ferdinand,	
Indiana)[1]	

ORDER TO SHOW CAUSE

Adopted: February 25, 1992; Released: March 5, 1992

By the Assistant Chief, Allocations Branch:

1. At the request of Daily News Broadcasting Company ("Daily News"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 6649 (1990), proposing the substitution of Channel 252C3 for Channel 252A at Bowling Green, Kentucky, and modification of its license for Station WDNS(FM) to specify the higher class channel. Daily News filed comments restating its intention to apply for the channel, if allotted. Hardin County Broadcasting Company, Inc. ("Hardin"), licensee of Station WQXE(FM), Channel 253A, Elizabethtown, Kentucky, filed a counterproposal proposing the substitution of Channel 252C3 for Channel 253A at Elizabethtown, Kentucky. In order to accomplish this upgrade, Hardin proposes the substitution of Channel 227A for Channel 252A at Bowling Green. Hardin also proposes the allotment of Channel 253A to Ferdinand, Indiana, as a first local FM service.[2] Daily News filed reply comments. In response to the counterproposal Daily News and Bristol Broadcasting Co. Inc. ("Bristol"), licensee of Station WKYQ(FM), Channel 227C1, Paducah, Kentucky, filed comments. After the record closed Hardin filed a motion to accept and a response to reply comments.[3]

2. In its counterproposal, Hardin states that as beneficiary of the Elizabethtown upgrade it will reimburse the licensee of Station WDNS as required by Commission policy. Hardin also states that it will apply for Channel 253A, if allotted to Ferdinand.

3. We believe the public interest would be served by the consideration of Hardin's counterproposal to substitute Channel 252C3 for Channel 253A at Elizabethtown, since it could provide the community with a wide coverage area FM service. In order to proceed with the consideration of Hardin's proposal in this proceeding, we must issue an *Order to Show Cause* to Daily News Broadcasting Company, licensee of Station WDNS(FM), Channel 252A, Bowling Green, Kentucky, seeking comments as to why its license should not be modified to specify operation on Channel 227A instead of Channel 252A, as requested by Hardin. This *Order to Show Cause* does not provide additional opportunity to comment on the merits of the proposal.

4. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Daily News Broadcasting Company, licensee of Station WDNS(FM), Channel 252A, Bowling Green, Kentucky, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 227A in lieu of Channel 252A.

5. Pursuant to Section 1.87 of the Commission's Rules, Daily News Broadcasting Company, may, not later than **April 27, 1992,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Daily News Broadcasting Company to furnish additional information. If Daily News Broadcasting Company raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Daily News Broadcasting Company will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

6. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Peter Guttman Pepper & Corazzini 200 Montgomery Building 1776 K Street, N.W. Washington, D.C. 20036 (Attorney for Daily News Broadcasting Company)	Lawrence Roberts Mark N. Lipp Mullin, Rhyne, Emmons and Topel, P.C. 1000 Connecticut Avenue, N.W., Suite 500 Washington, D.C. 20036 (Attorney for Hardin County Broadcasting Company, Inc.)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and com-

[1] The communities of Elizabethtown, Kentucky, and Ferdinand, Indiana, have been added to the caption.

[2] Public Notice of the counterproposal was given on February 15, 1991, Report No. 1838, RM-7633.

[3] These pleadings will be addressed in the *Report and Order* in this proceeding.

ment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

ECHOSTAR SATELLITE CORPORATION — File No. DBS-88-01

For Assignment of Direct Broadcast Satellite Orbital Positions and Channels

MEMORANDUM OPINION AND ORDER

Adopted: February 14, 1992; Released: March 5, 1992

By the Commission:

1. On August 15, 1989, the Commission granted the application of EchoStar Satellite Corporation ("EchoStar"), for authority to construct a Direct Broadcast Satellite ("DBS") system, conditioned on EchoStar's "due diligence" in the construction of its system. *Continental Satellite Corporation*, 4 FCC Rcd 6292, 6300 (1989) (*"Continental"*). The due diligence requirement, which is set forth in Section 100.19(b) of the Commission's Rules, 47 C.F.R. §100.19(b), provides, *inter alia*, that a DBS permittee must begin construction or complete contracting for the construction of its satellite(s) within one year of the grant of its construction permit. Under the policy established by the Commission in *Processing Procedures Regarding the Direct Broadcast Satellite Service*, 95 FCC 2d 250, 253 (1983) (*"DBS Processing Procedures"*), particular orbital positions and channels are not assigned to a DBS permittee unless and until it demonstrates that it has fulfilled this component of the due diligence requirement. Now under consideration are (i) documents and information submitted by EchoStar to demonstrate that it has completed contracting for the construction of its satellites, thereby complying with the first component of the due diligence requirement; (ii) requests from EchoStar for the assignment of particular orbital positions and channels; (iii) comments in opposition to EchoStar's due diligence showing filed by TEMPO Satellite, Inc. ("TEMPO")[1] and (iv) related pleadings.

2. In *Continental, supra*, the Commission determined that, in the interest of spectrum efficiency and in light of the Region 2 Plan adopted at the 1983 Regional Administrative Radio Conference ("RARC-83"),[2] "half-CONUS" signals[3] would be allocated only in east/west pairs, with eastern half-CONUS service permitted only from the four DBS orbital positions farthest east (61.5^0W, 101^0W, 110^0W, and 119^0W, referred to as "eastern orbital positions"); and western half-CONUS service permitted only from the four DBS orbital positions farthest west (148^0W, 157^0W, 166^0W, and 175^0W, referred to as "western orbital positions"). *Id.* at 6293. Accordingly, EchoStar was authorized to construct a DBS system consisting of (a) two or more satellites delivering eleven (11) half-CONUS channels to each half of the continental United States, or (b) one or more satellites delivering eleven (11) full-CONUS channels to the entire continental United States. *Id.* at 6300.[4]

3. On February 7, 1990, EchoStar filed a letter with the Commission stating that it had entered into a contract with General Electric Company, Astro-Space Division ("GE") for the construction of one 16 channel satellite "initially" to deliver 11 channels of full-CONUS DBS service. EchoStar further states that the contract includes "an option to acquire up to two additional satellites from GE." EchoStar states that the contract fully complies with the due diligence requirement of Section 100.19(b) of the Commission's Rules, and requests the assignment of 11 odd-numbered DBS channels at orbital position 119^0W.[5] Attached to EchoStar's February 7, 1990 letter were portions of the contract between EchoStar and GE. These contract portions contain, among other information, a detailed description of the design characteristics and specifications of the satellite to be built by GE;[6] a payment schedule; a list of construction progress milestones; an option to purchase up to two additional satellites; and a signature page bearing the signatures of Mr. C. Ergen, president of EchoStar, and Dr. R. L. Greenwood, division vice president and general manager of General Electric Company/Astro-Space Division. The payment due dates on the payment schedule were specified in terms of number of months after the "Effective Date of Contract" (contract date), February 6, 1990. According to that schedule, the first payment, 0.12% of the total contract

[1] TEMPO is an applicant for authorization to construct DBS facilities.

[2] The essential provisions of the RARC-83 agreements were incorporated into Appendix 30 (Orb 85) and Appendix 30A (Orb 88) of the International Telecommunications Union (ITU) Radio Regulations, as modified at the World Administrative Radio Conferences in 1985 and 1988. *See* para. 31, *infra*.

[3] Signals from DBS satellites which cover half of the continental United States are referred to as "half-CONUS" signals; those which cover the entire continental United States are referred to as "full-CONUS" signals.

[4] The four eastern orbital positions, 61.5^0W, 101^0W, 110^0W and 119^0W, may be technically suitable for delivering DBS service to any part of the continental United States. *Id.* at 6293-94. Western service, as a component of a full-CONUS signal, was authorized from eastern orbital positions, under the condition that any such authorization may be modified or rescinded if subsequent technical studies indicate that such service would violate the interference parameters of the Region 2 Plan. *Id.* at 6294.

[5] EchoStar also states that its request for channels at orbital position 119^0W is predicated on the assumption that there are not sufficient DBS channels currently available at orbital positions 101^0W or 110^0W to accomodate its allocation, and that if a sufficient number of channels at those orbital positions become available, it might wish to reconsider its request.

[6] On March 29, 1990, EchoStar filed with the Commission more detailed technical information concerning its contract with GE. This information includes copies of Exhibit A ("Statement of Work") and Exhibit B ("Spacecraft Specifications") to the contract, along with a letter from Mr. J. T. Lettiere, contract manager of G.E.'s Astro-Space Division, in which Mr. Lettiere states that Exhibits A and B "are the spacecraft specifications set forth in the February 6, 1990 contract...."

price, was due on February 6, 1990. The second payment, 1.25%, of the total contract price, was due ten months later, in December, 1990. All subsequent payments are due on a monthly basis. The list of construction progress milestones specified thirteen (13) milestones, but did not specify any dates for the accomplishment of those milestones.

4. On March 14, 1990, TEMPO filed comments in opposition to EchoStar's due diligence showing. TEMPO cites the more detailed due diligence requirements established by the Commission in *United States Satellite Broadcasting Company, Inc.*, 3 FCC Rcd 6858 (1988) (*"USSB"*), and asserts that EchoStar's due diligence showing does not satisfy those requirements "because the Commission cannot monitor the progress of construction based on the information which has been provided." TEMPO states that the construction milestone schedule submitted by EchoStar does not include a time frame for the accomplishment of the milestones; that EchoStar would not be making its second payment to GE until 10 months after the effective date of the contract, and there is no indication that any construction milestones are scheduled during that 10-month period; and that neither EchoStar nor GE "certified to the Commission that there are no unresolved contingencies which would prevent construction of the satellites".

5. On March 22, 1990, EchoStar filed an initial reply to TEMPO's comments, stating that, although the issues raised in TEMPO's comments did not vitiate its due diligence showing, it was submitting additional material to clarify the information in its previous submission and resolve any questions. Attached to the cover letter is a letter to the Commission from Mr. Ergen, in which he certifies that the February 6, 1990 contract between GE and Echostar "is a binding contract that contains no unresolved contingencies that could preclude substantial construction of the satellite." Mr. Ergen further states that the payment schedule and construction milestone schedule contained in its February 7 submission are sufficient to satisfy the Commission's due diligence requirements, but "[t]o the extent that a more specific milestone schedule may be useful to the Commission in monitoring EchoStar's design and construction progress, EchoStar is submitting the design and construction schedule originally agreed upon by the parties, as well as a graphic depiction of GE's Master Program Schedule (dated February 15, 1990) based upon the February 6 agreement." Also attached to the cover letter is a letter to the Commission from Mr. Lettiere of G.E.'s Astro-Space Division, in which Mr. Lettiere states that the contract "contains no unresolved contingencies that could preclude substantial construction of the satellite", and that EchoStar had made the first payment under the contract. Attached to Mr. Lettiere's letter is an amended construction milestone schedule which specifies 16 construction milestones over a period of 47 months. The time frame for accomplishment of each construction milestone is stated in terms of "Estimated Month", *e.g.*, milestone no. 1, "Conduct Baseline Definition Review", is to be completed by or in "Estimated Month" 2; milestone no. 2, "Conduct Trade-Off Study Report", is to be completed by or in "Estimated Month" 3; milestone no. 3, "Submission of Trade Off Study Report", is to be completed by or in "Estimated Month" 7. However, the date from which the "Estimated Month" is to be determined is not specified. If the "Estimated Month" is to be calculated from the contract date, February 6, 1990, then the first three milestones were to be accomplished by or in April, May and September, 1990, respectively.

6. On April 4, 1990, EchoStar filed a further reply to TEMPO's comments in opposition to EchoStar's due diligence showing. EchoStar states that its February 7, 1990 submission complies fully with the Commission's due diligence requirements, and that the "additional clarifying information" submitted on March 22 and 29, 1990, "simply supplements the substantial showing initially made on February 7." In this regard, EchoStar asserts that it has complied with the due diligence requirement because (a) a contract for the construction of its DBS satellite, which identifies the specific satellite and its design characteristics, was executed on February 6, 1990, on which date the first scheduled payment, 0.12% of the total contract price, was made; (b) the contract identifies specific dates for the start and completion of construction; (c) the contract includes a detailed payment schedule, and the certainty of the payment plan is ensured by the provision that payments will continue to be made even if GE misses a particular construction milestone; (d) EchoStar's committment to the completion of the contract is evidenced by its $17,500 filing fee paid to the Commission, its substantial downpayment to GE, and its contractual obligation to make the scheduled payments; and (e) the above information was conveyed to the Commission by submission of portions of the contract. With regard to TEMPO's assertion that its due diligence demonstration is inadequate because the contract does not contain any construction milestones during the first ten months of its term, EchoStar states that the Commission stated in *USSB*, *supra* at 6862 n20, that no set minimum number of milestones is required; that in its March 22, 1990 due diligence clarification it "provided additional detail concerning this phase of the project", including four additional construction milestones in the first eight months of the contract; and that the first construction milestone had, in fact, been accomplished on March 21, 1990.

7. In addition to the material discussed above, all DBS permittees are required to submit semi-annual reports describing the progress which has been made in the construction of their satellites. These reports must "specifically describe satellite construction progress in measurable terms, including individual milestones timely reached and scheduled payments made." *USSB*, *supra* at 6861. *See also*, *Continental*, *supra* at 6299.

8. On September 7, 1990, EchoStar submitted its first semi-annual progress report. EchoStar stated that, at that time, its satellite construction program was in the seventh month of a "nine month system design and definition phase"; and that the following "milestone design reviews" had been completed on the dates indicated, "represent[ing] the timely completion of milestones 2 and 3":

Trade-Off Study Interim Review	April 18, 1990
Trade-off Study Final Review	June 1, 1990

Thus, in its March 22, 1990 letter and its first semi-annual progress report, EchoStar appropriately reported the completion of its first three construction progress milestones. Further, from the dates of "timely completion of milestones 2 and 3", it is apparent that the "Estimated Month" on EchoStar's construction milestone schedule is

to be calculated from the contract date. In this regard, EchoStar appeared to be ahead of schedule at the time it submitted its first semi-annual progress report.

9. On July 26, 1991, EchoStar filed its second semiannual progress report, stating that it had retained Space Procurements International as a "consultant and liason" with GE; that it had continued to participate in "design review meetings" with GE; that the "spacecraft antenna optimization" for EchoStar's western DBS satellite had been calculated on the assumption that its western orbital position would be 148°W; that channels at orbital position 148°W were no longer available because they had been assigned to another DBS permittee,[7] and that, therefore, the design of EchoStar's western satellite was "under review" and awaiting assignment of a western orbital position. EchoStar further states that design of a "variable power divider", which will enable its satellite to be switched between half-CONUS and full-CONUS coverage, is also awaiting assignment of a western orbital position. Finally, EchoStar's July 26, 1991 semi-annual progress report lists "current construction progress milestone[s]" as follows:

A. SEPTEMBER 1990 - APRIL 1991

Continuation of Construction Modification covering:

Revision of SpaceCraft performance specification for construction phase of program.

Revision of elements for the spacecraft statement of work.

B. MAY-AUGUST 1991

Cost and Antenna Design Analysis from G.E.

Study of Analysis and Interpretation by Space Procurement International.

C. SEPTEMBER-DECEMBER 1991

Final Cost and Design Analysis from G.E.

Assuming that the FCC grants to EchoStar its requested orbital slots in September 1991.

Analysis by Space Procurement International

D. JANUARY-SEPTEMBER 1992

Conclude Final Cost and Design Analysisby GE ASTRO

Analysis by Space Procurement International

Initial Satellite Construction

These "current construction progress milestone[s]" differ from the construction milestones listed in EchoStar's February 7, 1990 due diligence demonstration and its March 22, 1990 due diligence clarification. EchoStar's second semi-annual progress report contains no explanation for these changes in the construction milestone schedule. Further, according to the payment schedule submitted by EchoStar as part of its February 7, 1990 due diligence showing, by July, 1991, EchoStar was scheduled to have made the first nine payments to GE, constituting 18.87% of the total contract price. EchoStar had previously reported that it had made the first payment specified in the payment schedule. However, EchoStar's July 26, 1991 second semi-annual progress report does not state whether the second through the ninth payments were made, or, if they were not made, why they were not made. Semi-annual progress reports must include "a detailed explanation of any failure to meet a construction milestone or make a scheduled payment." *Advanced, supra* at 2274. Accordingly, in a letter dated August 27, 1991, the Commission's staff requested EchoStar to submit a supplement to its second semi-annual progress report containing the information described above.

10. In a supplement to its second semi-annual progress report dated September 6, 1991, EchoStar states that the construction milestone schedule submitted with its original due diligence showing was an estimate based upon its assumption that the Commission would assign orbital positions and channels in late 1990 or early 1991. EchoStar further states that the "System Definition phases" and "Trade Off studies" which it had already completed pursuant to its construction schedule had raised numerous additional technical questions regarding the design of its satellite; that the additional design-related construction milestones listed in its second semi-annual progress report "reflected the results of the continuing definitive studies" which will make possible the construction of a "technologically advanced DBS system"; and that the parties had extended the milestone schedule pursuant to a provision in their satellite construction contract which "allow[s] for the design definition stages to be extended as necessary." In a second supplement to its second semi-annual progress report, dated September 20, 1991, EchoStar states that, as previously reported, it had already made the first payment to GE under the contract, in the amount of $100,000. Further, EchoStar cites the above described extension of the system design and definition phase of the construction schedule, and states that the additional payments are not due until the completion of that design and definition phase. Attached to EchoStar's September 20 submission is a copy of Article 3 of its satellite construction contract with GE, which provides, *inter alia*, that the parties may mutually agree to extend (or reduce) the "Program System Design and Definition Phase", and that the schedule of payment may be affected by such extension.

Discussion

11. In *Tempo Enterprises, Inc.*, 1 FCC Rcd 20 (1986) (*"Tempo"*), the Commission sumarized the basic foundation for demonstrating compliance with the first component of the due diligence requirement:

> There is a contract, signed by both parties, which contains no unresolved contingencies which could preclude substantial construction of the satellites. The essential terms of the contract are verified by

[7] *Advanced Communications Corporation*, 6 FCC Rcd 2269 (1991) (*"Advanced"*), *Reconsideration denied*, FCC 91-370, adopted November 12, 1991, released November 26, 1991.

> the submission of relevant portions of the document or by the principal's sworn statement as to the contents, verified by...[the satellite construction contractor]. Specific satellites and their design characteristics are identified, and dates for the start and completion of construction are specified. The payment terms and schedule are described sufficiently to demonstrate the parties' investment/commitment to completion of the system.

Id. at 21. In *USSB, supra*, the Commission clarified the contractual details which must be provided to demonstrate due diligence. The contracts or contract descriptions must include "regular[,] specific construction progress milestones in the construction timetable", *id.* at 6861, and "payment schedules with sufficient specificity for the Commission to determine that the permittee is making a financial commitment to the construction of the satellite and to indicate that the milestones listed for the early stages of construction constitute meaningful levels of advancement in the satellite construction process." *Id.* at 6862 n.20.

12. *Unresolved Contingencies.* Article 4.D. of the contract between EchoStar and GE provides that EchoStar is required to stablish six "irrevocable Payment Letter[s] of Credit in favor of" GE, and that "[f]ailure to establish any of the Payment Letter of Credit coverages on the... required Dates of Establishment shall constitute a default by...[EchoStar] subject to the provisions of ARTICLE 17F, TERMINATION FOR DEFAULT." Article 17F, "Termination for Default" was not among the portions of the contract submitted by EchoStar in its February 7, 1990 submission.

13. In *CBS, Inc.*, 99 FCC 2d 565 (1984), DBS permittee Direct Broadcast Satellite Corporation ("DBSC") had submitted payment and construction schedules which "appear[ed] to depend on payment of a specified cash sum and presentation of letters of credit...."*Id.* at 569. The Commission determined that such a requirement constitutes an impermissible unresolved contingency, and "stress[ed] that it is now eminently clear, and all applicants and permittees are on notice, that a contract with [such] a contingency... will not satisfy the due diligence requirement in the future." *Id.*

14. It was not clear that the "irrevocable Payment Letter of Credit" provision in the contract submitted by EchoStar on February 7, 1990, was distinguishable from that found to be unacceptable in *CBS, Inc., id.* Accordingly, in a letter dated July 24, 1991, EchoStar was requested to submit an explanation of how its contract with GE contains "no unresolved contingencies which could preclude substantial construction of the satellite", in light of the Commission's decision in *CBS, Inc., id.* In addition, as indicated above, Article 4.D. of EchoStar's satellite construction contract refers to "Article 17F, Termination For Default". By definition, any contractual termination/default provisions may constitute "unresolved contingencies which could preclude substantial construction of the satellite." However, Article 17F was not among the contract portions submitted by EchoStar. Accordingly, the Commission's July 24, 1991 letter also requested EchoStar to submit Article 17F of its satellite construction contract, as well as any other termination or default provisions, along with any facts or arguments to the effect that such provisions do not constitute "unresolved contingencies which could preclude substantial construction of the satellite."

15. In a response dated August 7, 1991, EchoStar states that it "has an immediate availability of the requisite funds for the necessary Letters of Credit"; that "[t]he maximum amount of documentary letters required by the contract under the payment plan is only 21 million dollars"; that, as demonstrated by an attached letter from the First Interstate Bank of Denver, N.A., EchoStar "currently has reserved and available to it 24 million dollars in documentary letters"; and that this demonstrates "the continuing interest and commitment of EchoStar in its DBS project" and should be sufficient to show that the Letter of Credit provisions in its contract with GE do not constitute unresolved contingencies. Attached to EchoStar's August 7, 1991 letter is a letter dated August 7, 1991, to the Commission from Ms. Sandra A. Sauer, Vice President, Commercial Lending of First Interstate Bank of Denver, N.A., in which Ms. Sauer states that her bank has had a banking relationship since 1984 with Echosphere Corporation, Houston Satellite Systems, Inc., and EchoStar Satellite Corporation, all owned by Mr. Charles Ergen; that Mr. Ergen's companies "continue to show strength in their cash flow resulting in a further strengthening of their balance sheet and good liquidity", and the bank "recognize[s] their projected ability to invest a sizable amount of equity in the DBS project"; that since 1984 the bank has issued more than 800 letters of credit to Mr. Ergen's companies "with an aggregate negotiated value of over 300 million dollars"; and that Mr. Ergen's companies currently have approximately 24 million dollars of Letter of Credit capacity available.

16. With regard to the termination/default provisions in its satellite construction contract, EchoStar states that such provisions "are customary in contracts of this kind"; and "do not permit unwarranted termination [by EchoStar] without substantial penalty", which penalty would include "all reasonable direct and indirect costs to the contractor plus a profit." EchoStar further states that the termination clauses "set the guidelines for mutually resolving contractual difficulties", such as default by the contractor due to "engineering or design failures or... inability to perform because of a subcontractor's default." In this regard, EchoStar states that "[t]here must be recourse to permit the Buyer to terminate the contract and resume the construction elsewhere"; and that these contractual provisions do not "imply that the parties are not committed to the completion of the project." Attached to EchoStar's August 7, 1991 letter are copies of Article 17 of its contract, "Termination For Default", and Article 18, "Termination For Convenience".

17. In *CBS, Inc., id.*, the Commission determined that a satellite construction contract containing unresolved contingencies would not satisfy the due diligence requirement because DBS permittees "could enter into such an agreement to proceed at some time in the future, with no significant current obligation, effectively tying up the orbit/spectrum resource and unduly delaying institution of DBS service to the public." *Id.* at 569. Further, the Commission determined that a provision in a satellite construction contract under which the payment and construction schedules would depend upon a future payment of cash and presentation of letters of credit constitutes an

impermissible unresolved contingency because "[n]either party would be sufficiently committed to the completion of construction of the satellites." *Id.*

18. EchoStar's situation is clearly distinguishable from that of DBSC in *CBS, Inc., id.* The letter from the First Interstate Bank of Denver, N.A., demonstrates that EchoStar has available the necessary resources to secure the specified letters of credit. Further, EchoStar's due diligence showing, its supplementary submissions (including the termination/default provisions in the contract), and its semi-annual progress reports demonstrate that EchoStar and GE have incurred "significant current obligation[s]", and are substantially "committed to the completion of construction of the satellites." *Id.* Initially, EchoStar has made its first payment of $100,000 to GE. Further, and more significantly, each party has undertaken significant contractual obligations directed toward completion of construction of the satellites. In this regard it must be understood that no matter how carefully a satellite construction contract may be formulated, and no matter how sincerely the contracting parties may initially intend to perform their obligations, there may be unforeseen circumstances or events which cannot be avoided and which might prevent substantial construction of the satellite. Neither the sincere intentions of the contracting parties nor the Commission's licensing policies can eliminate the possibility of such future circumstances or events. Rather than constituting "unresolved contingencies" which might prevent construction of the satellite, it appears that the termination/default provisions in EchoStar's construction contract are designed and intended to minimize the possibility and impact of future events by providing incentives for both parties to perform, and penalties for failure to perform. Thus, Article 17, "Termination for Default", provides that if GE fails to perform so as to "endanger performance of th[e] Contract", EchoStar has the right to "demand that all partially completed items be delivered", and to require GE to pay "all costs reasonably incurred... to have such items completed by other responsible contractors...." If EchoStar defaults, Article 17 provides that GE will be "entitled to retain all payments made" to that point, as well as "the total amount of the Payment Letter of credit for the applicable Payment Period Covered", and may seek additional compensation under Article 18, "Termination For Convenience". Article 18 provides that EchoStar may terminate the contract "in whole or in part, for any reason or for [EchoStar's] convenience at any time prior to final acceptance of all the work." However, in the event of such termination for "convenience", EchoStar shall be required to pay termination charges up to an amount equaling (a) the total projected contract cost of the spacecraft (Article 2, Item 1); (b) GE's total direct and indirect costs reasonably incurred "with respect to termination and settlement with all vendors and subcontractors"; and (c) a profit of twelve and one-half percent through month 24 of the construction schedule and fifteen percent thereafter (total profit not to exceed eleven million dollars). In view of the foregoing, the termination/default provisions in EchoStar's satellite construction contract with GE do not constitute "unresolved contingencies" which would render a due diligence showing inadequate or unacceptable for the purpose of assigning orbital positions and frequencies.

19. *Payment and Construction Milestone Schedules.* An analysis of EchoStar's payment schedule, including the changes reported in its second semi-annual progress report, as supplemented, reveals that, with the exception of the first payment of $100,000, which has already been made, payments are to be made over a period of 40 months. According to that schedule, in the tenth month, one quarter of the way through the payment period and two and one-half years before delivery of the spacecraft, EchoStar shall have paid to GE 23.87% of the total contract price. In the twentieth month, halfway through the payment period and one and two-thirds years before delivery of the spacecraft, EchoStar shall have paid to GE 58.87% of the total contract price. Under this payment schedule, it appears that EchoStar clearly would be "making a financial commitment to the construction of the satellite." *USSB, supra* at 6862 n.20. Further, "the initial payments are significant, and the majority of payments are due during the middle phases, well before the end of the construction period." *Tempo, supra* at 21. Accordingly, it appears that EchoStar's payment schedule, if adhered to, is sufficient to satisfy the standards established by the Commission. TEMPO has cited no deficiencies in EchoStar's payment schedule.

20. TEMPO asserts that EchoStar's construction milestone schedule is inadequate because it does not include a time frame for the accomplishment of the milestones, and the Commission therefore could not monitor the progress of the construction of EchoStar's satellite. However, in its clarified construction milestone schedule submitted on March 22, 1990, EchoStar lists sixteen construction milestones to be achieved at specified intervals over a period of 47 months, including delivery of the spacecraft in the 45th month. At the time EchoStar submitted its first annual progress report, on September 7, 1990, it appears that EchoStar was ahead of schedule in accomplishing its construction milestones. Had EchoStar been able to adhere to its clarified milestone schedule, it appears that it would have been sufficient to enable the Commission to monitor the construction progress of EchoStar's satellite.

21. In its second semi-annual progress report, as supplemented, EchoStar informed the Commission that it had added design-related milestones to its construction schedule because of technical questions raised in the design studies it had already completed. EchoStar further informed the Commission that its March 22, 1990 clarified milestone schedule had been formulated on the assumption that its orbital positions and channels would be assigned in late 1990 or early 1991; and that, because of the delay in such assignment and the addition of the design-related milestones just discussed, it had "extended" its payment schedule and its construction milestone schedule in accordance with its contract with GE. Under these circumstances, such modifications to its payment schedule and its construction milestone schedule are justified.

22. The essential terms of the contract between EchoStar and GE have been described in EchoStar's various submissions to the Commission, and verified by the submission of the relevant portions of the document. That contract identifies a specific satellite and its design characteristics, and contains no unresolved contingencies. We believe that EchoStar's payment schedule, its construction milestone schedule, and its efforts to adhere to that construction schedule, are clearly sufficient to "demon-

strate...[its] investment/commitment to completion of the system." *Tempo, supra* at 21. TEMPO has failed to submit any information tending to demonstrate that EchoStar's payment schedule and construction milestone schedule are not sufficient to meet the standards established in *Tempo, supra,* and *USSB, supra.* Accordingly, we find that EchoStar's payment schedule and construction milestone schedule, as modified, are sufficient to demonstrate due diligence and justify the assignment of specific orbital position and frequencies. However, in its second semi-annual progress report, as supplemented, although EchoStar justified the modifications to and extension of its payment and construction milestone schedules, it did not provide specific, chronological information on how its future payment or construction milestone dates had been modified or extended. Accordingly, in order to enable the Commission to continue to monitor the progress of the construction of EchoStar's satellite, this Order's finding that EchoStar has demonstrated due diligence, and its assignment of particular orbital position and channels, will be conditioned on EchoStar's submission, within thirty (30) days of the release of this Order, of an updated construction milestone schedule specifying the particular dates upon which its previously reported construction milestones are to be accomplished; and an updated payment schedule specifying the particular dates upon which payments are due.

23. The eastern orbital channels at 119^0W requested by EchoStar are available. Accordingly, EchoStar will be authorized to provide eastern half-CONUS or full-CONUS DBS service on channels 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, and 21 at orbital position 119^0W, on the condition that such authorization for full-CONUS service may be modified or rescinded if subsequent technical studies indicate that such service would violate the interference parameters of the Region 2 Plan, or other international treaties or agreements.[8]

24. *Western Orbital Position and Channels.* In a letter filed February 22, 1990, EchoStar states that, because of "uncertainty regarding the potential services that will ultimately be permitted from the Western orbital positions", its satellite construction contract with GE contains an option for the purchase of additional satellites; that although its February 7, 1990 submission did not request a Western orbital position it "contemplated the assignment... of a Western orbital slot"; that when the Commission completes the then-pending rulemaking proceeding concerning the uses of the Western orbital positions[9] EchoStar "will be able to finalize both its business plan for that slot and the specific satellite design characteristics most suitable to the permitted uses"; and that, if no orbital positions were available at 148^0W or 157^0W, it wished to be assigned the odd-numbered channels at orbital position 166^0W.

25. In its comments in opposition to EchoStar's due diligence showing, TEMPO notes that EchoStar only has an option for a western satellite, and asserts that "[u]ntil it actually contracts with its vendor to deliver the satellite, EchoStar has not completed its due diligence showing for the western position." In its reply to TEMPO's comments, EchoStar concedes that "ordinarily an option to acquire a satellite would not establish due diligence." However, EchoStar again argues that it is "impossible to commence the meaningful design and construction" of its proposed western satellite because of "uncertainty regarding the ultimate uses for the western orbital position"; and states that when the Commission completes its rulemaking proceeding in MM Docket No. 89-355 concerning uses of western orbital positions it will "promptly finalize contractual arrangements with GE for its second satellite...."EchoStar concludes that "under these circumstances, its option with GE should be sufficient to reserve orbit/channel assignments for the Western positions."

26. As stated in paragraph 1, *supra,* particular orbital positions and channels are not assigned to a DBS permittee unless and until it fulfills the first component of the due diligence requirement. *DBS Processing Procedures, supra* at 253. In order to satisfy the first component of the due diligence requirement, the DBS permittee must *begin construction* or *complete contracting* for the construction of its satellite. *Id. See* Section 100.19(b) of the Commission's Rules, 47 C.F.R. §100.19(b). EchoStar has not begun construction or completed contracting for the construction of a western satellite. The pendency of the Commission's rulemaking proceeding, MM Docket No. 89-355, addressing the question of whether DBS licensees should be authorized to devote their western orbital positions permanently and exclusively to nonconforming uses, and, if so, the kinds of nonconforming uses to be allowed, does not constitute sufficient reason to waive this aspect of the due diligence requirement. Initially, we note that DBS permittees were specifically reminded in *NPRM/MM Docket No. 89-355, supra,* that particular orbital positions and channels will be assigned only after the permittee "has satisfied the due diligence requirement that it begin construction or complete contracting for construction of its satellite system." *Id.* at 6309 n.1. Further, the possibility of permanent, exclusive nonconforming use of western orbital positions was entirely speculative in nature. In *Continental, supra,* EchoStar (and all other permittees addressed in that proceeding) were authorized to provide full-CONUS service, upon which permanent, exclusive nonconforming uses of western orbital positions was explicitly dependent, *only* on the condition that such full-CONUS authorization may be modified or rescinded if subsequent technical studies indicate that full-CONUS service would violate the interference parameters of the Region 2 Plan. *Id.* at 6294, 6303 n.12. *See* footnote 4, *supra.* Thus, the speculative nature of the possibility of permanent, exclusive nonconforming use of western orbital positions was made apparent when EchoStar's construction permit application was granted. In *NPRM/MM Docket No. 89-355, supra,* DBS permittees and applicants were reminded of the speculative nature of the possibility of permanent, exclusive nonconforming uses of western orbital positions when the Commission stated that the western orbital positions "will not even be available for possible [nonconforming] use...unless existing DBS permittees are able to surmount the difficulties of providing full-CONUS service from their eastern locations...." *Id.* at at 6307.[10] *See also, id.* at 6309 n.5.

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[8] *See* paragraph 31, *infra.*

[9] *Potential Uses of Certain Orbital Allocations in the Direct Broadcasting Satellite Service (NPRM in MM Docket No. 89-355),* 4 FCC Rcd 6306 (1989) (*"NPRM/MM Docket No. 89-355"*).

[10] Although this statement was made in the context of a discussion as to whether competing applications should be ac-

27. In light of the clearly speculative nature of the possibility of permanent, exclusive nonconforming use of western orbital positions, and the explicit reminder in *NPRM/MM Docket No 89-355, id.*, that particular orbital positions and channels are not assigned until the permittee satisfies the first component of the due diligence requirement, EchoStar could have satisfied that due diligence requirement by completing contracting for the construction of a western satellite to provide DBS service, with an option to modify the western satellite if nonconforming uses were authorized in MM Docket No. 89-355. Further, in *United States Satellite Broadcasting Company, Inc.*, 1 FCC Rcd 977 (1986), *recon. denied*, 2 FCC Rcd 3642 (1987) (*"USSB Declaratory Ruling"*), the Commission authorized any kind of nonconforming use of DBS facilities during the first license term, and further such nonconforming use of up to half of the capacity of each transponder after the first license term "during the remainder of the life of...[each licensees'] first satellites." *Id.* at 979. Thus, if EchoStar had made a definite determination that it wished to utilize its western orbital position for whatever nonconforming uses as might have been authorized in MM Docket No. 89-355, it could have satisfied the first component of the due diligence requirement by completing contracting for the construction of a western satellite to provide such services pursuant to the authority established in *USSB Declaratory Ruling, id.*, with an option to modify the western satellite if nonconforming uses were limited or prohibited in MM Docket No. 89-355. In any event, EchoStar was not prevented from completing contracting for its proposed western satellite because of "uncertainty regarding the ultimate uses for the western orbital position."[11]

28. In addition, on May 14, 1991, the Commission released *Potential Uses of Certain Orbital Allocations in the Direct Broadcasting Satellite Service (Report and Order in MM Docket No. 89-355)*, 6 FCC Rcd 2581 (1991) (*"R&O/Docket No. 89-355"*). The Commission determined that, due to the unpredictability of future configurations of DBS systems and uncertainty as to the feasibility of full-CONUS service, it would not establish new policies regarding permanent, exclusive nonconforming uses of western orbital positions. *Id.*[12] EchoStar states in its reply to TEMPO's comments that it would "promptly finalize contractual arrangements with GE for its second satellite" when the Commission completed its rulemaking proceeding in MM Docket No. 89-355. However, in its second semiannual progress report, filed more than two months after the release of *R&O/Docket No. 89-355, id.*, EchoStar does not address the question of whether it has completed contracting for construction of a western satellite. Currently, nine months have elapsed since the release of *R&O/Docket No. 89-355, id.*, and EchoStar still has not demonstrated that it has completed contracting for construction of its proposed western satellite.

29. Accordingly, a western orbital position and channel assignment cannot be made to EchoStar at this time. Pursuant to the policy established in *DBS Processing Procedures, supra* at 253, EchoStar can be assigned a western orbital position and channels only if it demonstrates that it has fulfilled the first component of the due diligence requirement by *completing* contracting for the construction of its proposed western satellite. In this regard, we note that, as discussed above, Section 100.19(b) of the Commission's Rules provides that a DBS permittee must complete contracting for the construction of its satellite(s) within one year of the grant of its application in order to satisfy that aspect of the due diligence requirement. EchoStar obviously will not be able to comply with this requirement for its proposed western satellite. However, EchoStar did demonstrate due diligence for its eastern satellite within the specified one-year period. In addition, Echostar submitted its argument regarding its proposed western satellite within the one-year period. That argument does not appear to be frivolous or formulated for the purpose of delay.[13] Under these circumstances, and in view the investment in, and commitment to, the establishment of a DBS system demonstrated by EchoStar, we do not believe the public interest would be served by the cancellation of Echostar's western orbit/channel reservation due to its failure to satisfy the due diligence requirement for its proposed western satellite within the specified one-year period. Therefore, EchoStar shall have three (3) months from the release of this Order to demonstrate due diligence with regard to its proposed western satellite.

30. Finally, in this Order we find that EchoStar has completed contracting for an eastern satellite, thereby demonstrating due diligence for that eastern satellite, and we assign a specific eastern orbital position and channels. However, as discussed above, in *Continental, supra* at 6293, we determined that, in order to ensure that the maximum number of channels of DBS service are delivered to the entire continental United States, and in order to ensure compliance with international agreements, DBS orbital positions and channels would be assigned only in east/west pairs. Since the delivery of full-CONUS signals would not detract from the Commission's policy of maximizing the number of channels of DBS service delivered to the entire continental United States, and full-CONUS service may be technically feasible from the eastern orbital positions, we authorized some permittees, including EchoStar, to deliver full-CONUS signals on the condition that such authorization to deliver full-CONUS signals could be modified or rescinded if such service does not comply with the technical requirements of international agreements or the Commission's Rules. *Id.* at 6294, 6302 n.11. Questions regarding the feasibility of full-CONUS service are reiterated in *NPRM/MM Docket No. 89-355, supra* at 6307, 6309 n.5, and in *R&O/Docket No. 89-355, supra* at 2581. If EchoStar fails to demonstrate due dili-

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cepted for "alternative operations" at western orbital positions, it clearly reiterates the speculative nature of the possibility of such non-DBS use.

[11] In this regard we note that Advanced Communications Corporation and Hughes Communications Galaxy, Inc., two DBS permittees who had their construction permits granted or modified at the same time EchoStar's construction permit was granted in *Continental, supra*, were not prevented by the pendency of the rulemaking proceeding in MM Docket No. 89-355 from satisfying the first component of the due diligence requirement. Both of those permittees completed contracting for construction of western satellites, and had specific western orbital positions and channels assigned. *Advanced, supra.*

[12] In so doing, the Commission specifically "point[ed] out that the current DBS permittees all filed applications with the express expectation of providing DBS service, and we have done nothing to alter or diminish the bases upon which such expectations presumably were founded." *Id.* at 2583.

[13] All DBS permittees are now on notice that such arguments are without merit.

gence with regard to its proposed western satellite, it would only have an eastern orbital position and channels, and it would be able to provide DBS coverage to the entire continental United States *only* if fullCONUS service from its eastern orbital position is, in fact, possible consistent with the Commission's technical rules and international agreements. It may be years before it is determined whether such service is possible. If full-CONUS service is *not* possible consistent with the Commission's technical rules and international agreements, EchoStar will be able to provide service only to the eastern half of the continental United States, and the corresponding western channels would not be used to deliver DBS service to the western half of the continental United States unless an applicant were to come forward and take the risk that operation of eleven western half-CONUS channels would be economically feasible. Such a situation would violate the Commission's stated policy of maximizing the number of channels of DBS service to be delivered to the entire continental United States, and would have tied up a valuable orbit/channel resource which could have been assigned to a permittee that could have delivered DBS service to the public. In this regard, we note that other DBS permittees, some of whom have already demonstrated due diligence for their current orbit/channel allocations, have outstanding modification requests seeking to increase the number of channels assigned to each of them. *Continental, supra* at 6299. However, at the time that Order was released, an insufficient number of DBS channels were available to accommodate those requests. Therefore, those applicants each were granted an equal number of channels from the then-available supply, and the Commission stated that if any DBS permit were to be surrendered or cancelled, the applicants seeking additional channels in that proceeding "will have the first right to additional allocations, apportioned equally, up to the number requested in their applications." *Id.* Accordingly, this Order's finding that EchoStar has demonstrated due diligence for its eastern satellite, and its assignment of an eastern orbital position and channels, will be conditioned on EchoStar's satisfaction of the due diligence requirement for its proposed western satellite within three (3) months of the release of this Order, as specified above. If EchoStar fails to demonstrate due diligence for its western satellite by that date, its construction permit will be cancelled, the channels assigned to EchoStar in this Order will be reassigned, and EchoStar's channel reservation will be reapportioned among the other DBS permittees who have modification/channel increase requests held in abeyance pursuant to *Continental, id.*

31. *Additional Technical Information.* In order to issue a revised construction permit and insure that international coordination is initiated in a timely fashion, EchoStar is directed to supply, within thirty (30) days of the release of this Order, updated technical information for its proposed eastern satellite. This information should include the "Basic Characteristics to be Furnished in Notices Relating to Space Stations in the Broadcasting - Satellite Service," contained in Annex 2 of Appendix 30 (Orb 85) of the ITU Radio Regulations. Appropriate calculations should be supplied to demonstrate compliance with paragraphs 1 through 8 of Annex 1 of Appendix 30 (Orb 85), as applicable. Particular attention should be paid to shaped beam contours to ensure that they are of sufficient detail to permit verification of all necessary calculations. As a guideline, see paragraph 12(h) of Annex 2. Finally, EchoStar should provide a detailed description of any technical characteristics to be utilized which differ from those assumed for international planning purposes, *e.g.*, the use of 26 MHz channel bandwidth. In this regard, EchoStar should provide an analysis demonstrating that the proposed technical characteristics would not cause more interference or require more protection than the assumptions used for planning purposes. The Commission may, upon further analysis, impose whatever conditions or limitations it determines to be necessary in order to ensure compliance with applicable international provisions when the cumulative effects of various proposals are considered. This is particularly so with regard to multi-operator use of full-CONUS service beams from the four easternmost orbital positions.

32. Accordingly, IT IS ORDERED, That the opposition to EchoStar's due diligence showing filed by TEMPO Satellite, Inc., IS GRANTED to the extent indicated herein, and IS DENIED in all other respects.

33. IT IS FURTHER ORDERED, That DBS orbital positions and channels are assigned to EchoStar Satellite Corporation as specified in paragraph 23 of this Order, on the conditions (a) that EchoStar submit, within thirty (30) days of the release of this Order, the updated technical information described in paragraph 31 of this Order; (b) that EchoStar submit, within thirty (30) days of the release of this Order, updated payment and construction milestone schedules specifying the dates upon which its previously reported payments and construction milestones are to be accomplished, as described in paragraph 22 of this Order; (c) that EchoStar demonstrates due diligence for its proposed western satellite within three (3) months of the release of this Order; and (d) that EchoStar's authorization may be modified or rescinded if analysis of updated technical information indicates that such service would violate the interference parameters of the Region 2 Plan, or other international treaties or agreements. This assignment of orbital positions and channels does not include launch and/or operational authority for any phase of the permittees' modified proposals. Upon (i) submission of the updated technical information described in paragraph 30 of this Order, and analysis of that information to determine compliance with international treaties and agreements; and (ii) compliance with the other conditions specified above, an instrument of authorization, including launch authority, will be issued by the staff.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 91-112

In the Matter of

Amendment of Part 90 Revising Authorized Bandwidths in the 24.05-24.25 GHz and 33.4-36.0 GHz Frequency Bands — RM-7317

REPORT AND ORDER

Adopted: February 20, 1992; Released: March 5, 1992

By the Commission:

I. INTRODUCTION

1. This *Report and Order* amends Part 90 of our Rules to provide greater flexibility in the design and use of equipment using frequencies in the 24.05-24.25 GHz and 33.4-36.0 GHz bands. This rule change deletes the 50 MHz bandwidth limitation in the two bands and provides for authorization of bandwidths in these bands on a case-by-case basis. Elimination of this restriction will promote increased use of these bands by enabling the development of equipment using unique wideband modulation techniques.

II. BACKGROUND

2. The frequency bands 24.05-24.25 GHz and 33.4-36.0 GHz are designated for Part 90 Radiolocation Service use. Frequencies in these bands are used in equipment designed to determine distance, speed, direction, or position for purposes other than navigation,[1] and are authorized for operation with up to a maximum bandwidth of 50 MHz.[2] On April 18, 1991, we released a *Notice of Proposed Rule Making* (*Notice*) that proposed amending Part 90 rules to revise the bandwidth limitation in these two bands.[3] Comments on the *Notice* were filed by John F. Fuhrman (Fuhrman), the Radio Association Defending Airwave Rights, Inc. (RADAR), Whistler Corporation (Whistler), and the American Petroleum Institute (API). Reply comments were filed by RADAR.

III. DISCUSSION

3. The *Notice* proposed to eliminate the 50 MHz bandwidth limitation currently specified in Section 90.209(b)(6) and to authorize bandwidths in the 24.05-24.25 GHz and 33.4-36.0 GHz bands on a case-by-case basis. This proposal was opposed by Fuhrman, RADAR and Whistler, and supported by API. The *Notice* also proposed to clarify that the maximum 25 MHz authorized bandwidth for the 10.55-10.68 GHz band -- as specified in Section 90.209(b)(6) -- applies only to grandfathered systems. No comments were received on this proposal.

4. Applied Concepts, Inc. (Applied), in its petition initiating this proceeding, stated that it was requesting a rule change to enable it to develop a law enforcement traffic radar that could not be detected by ordinary radar detectors.[4] Fuhrman comments that legislatures should determine whether traffic radar should be undetectable, and it is not necessary or desirable "for a manufacturer to make that determination and ask for the de-facto implementation of that policy decision through its technology and rule changes by a Federal Agency."[5] Fuhrman further comments that the public interest will not be served by this action, that there is no showing made that traffic radar performance will be improved, and that the *Notice* "abandons proven procedures for subjective processes not subject to public review."[6] Whistler states that "the representation by Applied Concepts ("Applied") that its use of wideband technologies will permit the development of 'undetectable' radars is as Applied clearly knows, wishful thinking." Whistler further claims that they and others have "repeatedly demonstrated the technical capability of developing systems that can track any radar technology."[7]

5. In this proceeding, our intent is not to abandon or endorse any particular technology, but to remove a restrictive rule and thus provide the industry with the technical flexibility to develop new and different technologies to improve system performance.[8] We are not making a determination, as Fuhrman suggests, as to whether traffic radar should be undetectable, but, through our actions are permitting the development of new types of equipment that will be available not only to state and local law enforcement agencies, but to all eligibles in the Radiolocation Service. Also, while frequencies in these bands are now primarily used in traffic radar equipment, we conclude that it is not justifiable to hinder potential expanded use of these bands because of a controversy over the development of new technologies for this type of equipment.

6. RADAR, in its comments, questions the desirability of our proposal with regard to its effect on spectrum efficiency and the creation of harmful interference. Specifically, RADAR comments that effective spectrum management dictates that spectrum be used with narrower

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[1] Radiolocation Service rules are contained in Part 90, Subpart F of the Commission's Rules, 47 C.F.R. §§ 90.101 and 90.103.

[2] 47 C.F.R. § 90.209(b)(6) currently specifies that the maximum authorized bandwidth is 25 MHz in the frequency band 10.55-10.68 GHz and 50 MHz in the frequency bands above 16 GHz. The frequency band 10.55-10.68 GHz is no longer available to new Part 90 licensees. Two frequency bands above 16 GHz, 24.05-24.25 GHz and 33.4-36.0 GHz, are available for Part 90 Radiolocation Service use pursuant to Section 90.103(b).

[3] *Notice of Proposed Rule Making*, PR Docket No. 91-112, 6 FCC Rcd 2145 (1991).

[4] The equipment being developed by Applied uses a wideband modulation technique known as frequency-hopping, and requires more than a 50 MHz bandwidth.

[5] Comments of Fuhrman at 2 and 3.

[6] *Id.* at 4, 6 and 7.

[7] Comments of Whistler at note 1.

[8] *See, Notice* at para. 4.

rather than wider channels, and that the public should be assured that the Government Radiolocation Service will not be handicapped in any way.[9] RADAR further argues that the proposed rule making can impact other FCC rule provisions. They point out that because Section 90.175(f)(6) exempts the Radiolocation Service from frequency coordination, Section 90.209(b)(6) should be further amended to require that applicants provide a spectrum compatibility analysis demonstrating that the proposed wideband system will not jeopardize other operations.[10] Finally, RADAR expresses concern that the *Notice* did not address the impact of the proposed rule making on equipment subject to the provisions of Sections 90.103(c)(22) and (24).[11]

7. We agree that the use of narrower channels generally permits more users in a given amount of spectrum. This is not always so when systems employ spread spectrum techniques, where spectrum efficiency might be *increased*. We cannot, however, justifiably deny access for the use of wideband systems in lightly-used frequency bands when those systems might provide significant benefits over narrower bandwidth systems. With regard to RADAR's concern about the Government Radiolocation Service, all Part 90 Radiolocation Service operations in bands shared with the Government are coordinated with the Government.[12] As to RADAR's suggestion of a spectrum compatibility analysis, we believe this is impractical because radiolocation operations, including traffic radar operations, are generally movable and not confined to one location. Radiolocation systems are usually authorized for large areas of operation, and it would be difficult, if not impossible, to determine the effect that a wideband system would have upon existing and future operations authorized in the same band. With regard to possible interference to equipment subject to Sections 90.103(c)(22) and (c)(24), we observe that equipment operating under these rule provisions consist primarily of traffic speed measuring devices and such devices are subject to minimal interference because they operate at constantly changing locations for a limited period of time, have a short range and a very narrow beamwidth. We, therefore, find no inconsistency between our decision to authorize wideband operations in these bands and the provisions of Sections 90.103(c)(22) and (c)(24).

8. Whistler opposes our proposal claiming it is overly broad in its objective. Whistler, however, states that it does not oppose, in principle, the decision to facilitate the use of wideband technologies in the higher frequency bands. Whistler also argues that the proposed amendments may preclude the introduction of vehicle collision avoidance systems. Whistler specifically urges the Commission "to undertake a more studied approach in this *NPRM* by conducting a thorough investigation and analysis of the various vehicle safety technologies now on the market or under development that may be impacted, or possibly precluded, by the use of wideband vehicle radar."[13] In response to this suggestion, we note that vehicle collision avoidance systems would be authorized under Part 15 of the Rules and as such would not be protected from interference from authorized primary operations.

IV. CONCLUSION

9. This *Report and Order* amends Section 90.209(b)(6) by deleting the bandwidth limitation in the 24.05-24.25 GHz and 33.4-36.0 GHz bands. Bandwidth will be authorized by the Commission on a case-by-case basis. Additionally, because the 10.55-10.68 GHz band is no longer available to Part 90 applicants, Section 90.209(b)(6) is further amended to indicate that the 25 MHz bandwidth limitation for the 10.55-10.68 GHz band applies only to grandfathered systems. This deregulatory rule change will enable the development of equipment operating in the 24.05-24.25 GHz and 33.4-36.0 GHz frequency bands employing wideband modulation techniques and will eliminate the need for requesting rule waivers or a rule change. We believe that this action is in the public interest because it will result in the development of new technologies, the expanded use of the two bands, and a decreased burden on applicants desiring to operate in these bands.

V. FINAL REGULATORY FLEXIBILITY ANALYSIS

10. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

Need and Purpose of this Action

11. This deregulatory action will eliminate the need for rule waiver or further rule change requests and will result in decreased burden on the public and the Commission.

Issues Raised in Response to the Initial Regulatory Flexibility Analysis

12. There were no comments submitted in response to the Initial Regulatory Flexibility Analysis.

Significant Alternatives Considered and Rejected

13. We considered the alternatives contained in the comments submitted in response to the *Notice of Proposed Rule Making*. Aside from maintaining the *status quo*, there are no alternatives other than those discussed in this *Report and Order*.

VI. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(i), 303(r) and 332(a)(2) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 332(a), Part 90 of the Commission's

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[9] Comments of RADAR at 2 and 4.

[10] Comments of RADAR at 3. Whistler, in its Comments at 2 and 3, also suggests that requests for wideband authorization include a spectrum impact analysis on current and future users.

[11] Section 90.103(c)(22) specifies that equipment operating on 24,125 MHz shall employ only unmodulated continuous wave emissions (NON) and shall maintain at least a 0.2 percent frequency stability. Section 90.103(c)(24) states that field disturbance sensors that operate in the 24.05-24.25 GHz band with field strengths equal to or less than 250,000 microvolts per meter at 30 meters will not be type accepted under Part 90 and must meet the requirements of Part 15 of the Rules.

[12] Part 90 operations in the 24.05-24.25 GHz and 33.4-36.0 GHz bands are shared with and are secondary to the Government Radiolocation Service.

[13] Comments of Whistler at 1 through 6.

Rules, 47 C.F.R. Part 90, IS AMENDED set forth in the Appendix below, *effective* [thirty days after publication in the Federal Register].

15. IT IS FURTHER ORDERED that this proceeding is TERMINATED.

16. For further information regarding this *Report and Order*, contact Eugene Thomson, Rules Branch, Land Mobile and Microwave Division, Private Radio Bureau, (202) 634-2443.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

47 C.F.R. Part 90 is amended as follows:

1. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4, 303, 331, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303 and 332 unless otherwise noted.

2. 47 C.F.R. § 90.209 is amended by revising paragraph (b)(6) to read as follows:

§ 90.209 Bandwidth limitations.

* * * * *

(b) * * *

(6) The authorized bandwidth for assignments in the 24,050 to 24,250 MHz and 33,400 to 36,000 MHz frequency bands listed in § 90.103 shall be specified in the station authorization. Stations authorized in the 10,550 to 10,680 MHz band under this Part prior to April 17, 1981, will retain their initial bandwidth authorization.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 92-30

In the Matter of

Amendment of the Maritime Services Rules (Part 80) to add the San Francisco port area to the list of U.S. Coast Guard Vessel Traffic Service (VTS) systems and designate marine VHF channel 14 as the San Francisco port area VTS frequency. RM-7603

NOTICE OF PROPOSED RULE MAKING

Adopted: February 20, 1992; Released: March 5, 1992

Comment Date: April 27, 1992
Reply Comment Date: May 12, 1992

By the Commission:

I. INTRODUCTION

1. This Notice of Proposed Rule Making (Notice) proposes to amend Part 80 of the Commission's Rules, 47 C.F.R. Part 80, to add the San Francisco, California port area to the United States Coast Guard (Coast Guard) designated radio protection areas for mandatory Vessel Traffic Services (VTS) and establish marine VHF channel 14 (156.7 MHz) as the VTS frequency for the San Francisco port area. We are proposing these rule changes at the request of the Coast Guard.[1]

II. BACKGROUND

2. A VTS system is used as an advisory service to coordinate vessel movement and prevent collisions in large, busy port areas. Vessels report information related to position, navigation, and conditions affecting their ability to navigate to the Coast Guard, which then tracks the vessel's movements. VTS systems use VHF marine radiotelephone equipment to exchange voice communications on channels dedicated to VTS operations in Coast Guard designated VTS areas.

3. The Commission amended its Rules in 1975, at the Coast Guard's request, to make frequencies available in certain designated areas exclusively for VTS communications.[2] Frequencies allotted for VTS communications are available for assignment outside of VTS designated areas on a noninterference basis.[3] Currently, Section 80.383 of the Commission's Rules, 47 C.F.R. § 80.383, lists four geographic areas - Seattle, New York, New Orleans and Houston - as Coast Guard designated VTS areas.

III. DISCUSSION

4. As a result of the Oil Pollution Act of 1990[4] the Coast Guard has proposed rules that would require certain vessels to participate in a VTS system in the port of San Francisco.[5] This proposal is part of a Coast Guard program designed to protect the marine environment by preventing vessel collisions and groundings. Designating San Francisco as a VTS area will allow the Coast Guard to manage vessel traffic in that area more efficiently. We are proposing, therefore, to add San Francisco to the Commission's list of designated radio protection areas for VTS systems specified in Section 80.383 of the Rules.[6] For the purposes of Part 80, the San Francisco port area would be defined as a rectangle bounded by the coordinates 39 degrees on the north, 37 degrees on the south, 123 degrees 50 minutes on the west and 120 degrees 50 minutes on the east.

5. Presently, the Coast Guard operates a voluntary VTS system in San Francisco on marine VHF channel 13 (156.65 MHz). The Coast Guard is concerned, however, that channel 13 may become congested once participation in the VTS system becomes mandatory. It requests marine channel 14 be allocated for VTS operations in San Francisco. We agree with the Coast Guard that channel 13 would not be the most appropriate channel for a mandatory VTS operation. This channel, the bridge-to-bridge channel, is already extensively used for navigation and safety communications.[7] We propose to designate marine channel 14 (156.7 MHz) exclusively for VTS operations within the specified geographic area. This channel is already allotted for VTS communications in other ports. Additionally, we propose to permit private coast stations currently authorized to operate on channel 14 within the VTS area to continue operation until the end of their current license term.[8] Further, staff will work with affected licensees to find suitable alternative channels.

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[1] *See* letter from Commandant, United States Coast Guard to George R. Dillon, Chief, Aviation and Marine Branch (January 8, 1991).

[2] *See* Report and Order in Docket No. 20444, 56 FCC 2d 1089 (1975).

[3] *See*, for example, footnote 3 of section 80.373(f) of the Commission's Rules, 47 C.F.R. § 80.373(f).

[4] Oil Pollution Act of 1990, Pub. L. No. 101-380,104 Stat. 484.

[5] *See* Notice of proposed rulemaking, CGD 90-020, 56 Fed. Reg. 36910 (1991).

[6] We will withhold taking final action in this matter until the Coast Guard proceeding is finalized.

[7] Channel 13 is the bridge-to-bridge channel and is used for navigational communications between the bridge of one vessel to the bridge of another.

[8] There are currently 2 licensed private coast stations that would be affected by this proposal.

IV. PROCEDURAL MATTERS

Ex Parte Rules - Non-Restricted Proceeding

6. This is a non-restricted notice and comment rule making proceeding. *Ex Parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission Rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, 1.1206(a).

Regulatory Flexibility Act

7. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and has been found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase burden hours imposed on the public.

8. We have determined that Section 605(b) of the Regulatory Flexibility Act of 1980 (Pub. L. 96-354) does not apply to this rule making proceeding because, if the proposed rule amendments are promulgated, there will not be a significant economic impact on a substantial number of small business entities. The proposed rule would promote vessel safety by adding San Francisco to the list of designated radio protection areas for VTS systems contained in the Commission's Rules. The Coast Guard has proposed rules requiring mandatory VTS participation in the San Francisco port area.

Notice and Comment

9. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **April 27, 1992,** and reply comments on or before **May 12, 1992.** To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

10. IT IS ORDERED that a copy of this Notice shall be sent to the Chief Counsel for Advocacy of the Small Business Administration. *FCC Contact:* J. Joy Alford, Private Radio Bureau, Aviation and Marine Branch, (202) 632-7175.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 80 of Chapter 1 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

Part 80 - Stations in the Maritime Services

1. The authority citation for part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301, 609; 3 UST 3450, 3 UST 4726, 12 UST 2377.

2. § 80.383 is amended by revising the table in paragraph (a) to add San Francisco to the list of geographic areas for the carrier frequency 156.700 MHz, amending paragraph (b)(3) by removing the final "and", amending paragraph (b)(4) by replacing the final "." with "; and" and adding a new paragraph (b)(5) to read as follows:

§ 80.383 Vessel Traffic Services (VTS) system frequencies.

* * * * *

(a) Assigned frequencies:

VESSEL TRAFFIC CONTROL FREQUENCIES

Carrier frequencies (MHz)	Geographic areas
* * * * *	
156.700	New York, New Orleans[1], Seattle, San Francisco.[2]

[2] Existing private coast station licenses for the use of this frequency will not be renewed beyond their current term. Continued use until expiration must be on a noninterference basis to Coast Guard VTS communications.

(b) * * *

(5) *San Francisco.* The rectangle between north latitudes 37 degrees and 39 degrees and west longitudes 120 degrees 50 minutes and 123 degrees 20 minutes.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-440

In re Applications of

ACHERNAR BROADCASTING COMPANY — File No. BPCT-860410KP

LINDSAY TELEVISION, INC. — File No. BPCT-860410KQ

For Construction Permit for a
New Television Station,
Channel 64,
Charlottesville, Virginia

MEMORANDUM OPINION AND ORDER

Adopted: February 26, 1992; Released: March 5, 1992

By the Commission:

1. Lindsay Television, Inc has filed a petition for reconsideration of our final decision in this case, 6 FCC Rcd 5393 (1991), in which we denied both Lindsay's application and the competing application of Achernar Broadcasting Company because of the interference that each would cause to the National Radio Astronomy Observatory (NRAO) in Green Bank, West Virginia.[1]

2. Lindsay argues that we predicated our reversal of the Review Board's decision granting its application on a new policy that is at odds with previously-established policy on which Lindsay relied and that our application of the new policy against it is contrary to the retroactivity doctrine discussed in *Clark - Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074 (D.C. Cir. 1987), and *Retail, Wholesale & Department Store Union v. NLRB*, 466 F.2d 380 (D.C. Cir. 1972). There is no merit in this argument, for our action was consistent with established policy. As we have already explained, 6 FCC Rcd at 5394 ¶¶ 12-14, there was no extant policy that precluded denial of an application like Lindsay's in order to protect the NRAO from interference; rather, this is a case of first impression, and the Communications Act required us to resolve it as we did. *Id.* at ¶ 14; see *Retail, supra*, 466 F.2d at 390-91. Thus, there has been no "radical transformation whose retroactive application is likely to be unfair." *See District Lodge 64 v. NLRB*, D.C. Cir. case no. 19-1503, decided Nov. 29, 1991, slip op. at 12.

3. Lindsay also contends that we judged its application by a strict interference standard -- specifically, a requirement that its signal not exceed a certain level of intensity over Green Bank -- that has not been applied against other, similarly-situated applicants for authorizations to operate television stations from sites outside the Quiet Zone; that there is no relevant distinction between this case and the cases involving such other applicants; and hence that our decision here was contrary to *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965). There are two fallacies in this argument. First, it is not true that we denied Lindsay's application merely because the signals from its proposed station would exceed a certain level of intensity over Green Bank. Rather, we denied its application for failure to persuade us that granting it would serve the public interest even though the proposed station would completely preclude astronomic observation at Green Bank over a spectral range of 8 MHz. 6 FCC Rcd at 5395 ¶¶ 15-18. Second, and more importantly, there is a relevant distinction between this case and others where applications specifying sites outside the Quiet Zone have been granted without regard to possible interference with the NRAO. Only in this case was the Commission apprised that the applicant would cause interference to observation at Green Bank that the NRAO considered objectionable.[2]

4. Next, Lindsay contends, citing *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), that it is entitled to comparative consideration with applications for renewal of license for all television stations so located that there is a reasonable likelihood that their transmissions interfere with use of the NRAO's facilities. What Lindsay means to suggest, we take it, is that we may not deny its application without holding a further hearing to decide whether granting its application instead of one or more such renewal applications would strike a better accommodation between the public interest in preserving the NRAO's scientific usefulness and the goal of promoting fair, efficient, and equitable distribution of television service. This contention is tantamount to a non-specific request for consolidation, a form of relief not previously sought. We do not agree that Lindsay has an *Ashbacker* right to demand such a consolidation at this point. *Ashbacker* rights are subject to reasonable restriction in the interest of administrative efficiency. Thus, by the terms of 47 C.F.R. §1.227(a), the Commission reserves the right to deny requests for consolidation when it does not appear that consolidation would "best conduce to the proper dispatch of business and to the ends of justice." Lindsay has not shown, and it is not apparent, that it would best serve those objectives to grant an eleventh-hour request for consolidation of this proceeding with consideration of numerous renewal applications.

5. Finally, Lindsay contends that our decision is not "substantially justified" within the meaning of the Equal Access to Justice Act. This contention is irrelevant because the Equal Access to Justice Act pertains only to "adversary adjudication[s]," which 5 U.S.C. §504(b)(1)(C) defines as excluding licensing proceedings such as this one.

6. ACCORDINGLY, IT IS ORDERED that the petition for reconsideration filed by Lindsay Television, Inc. on October 21, 1991 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Lindsay filed the petition on October 21, 1991. Cornell University filed a motion on November 7 for leave to intervene for the limited purpose of filing comments. We will grant Cornell's motion and accept the comments.

[2] As Cornell notes in its comments, in an earlier case in which an analogous concern was raised as to the potential interference that a proposed FM station would cause to the Environmental Science Services Administration's radio propagation research facilities at Table Mountain, Colorado, the Review Board denied an application for the reason that the detrimental impact to the ESS facility would not be outweighed by the benefit of the new service that the proposed station would provide. *Russel Shaffer et al.*, 17 FCC 2d 49, 68 (Rev. Bd. 1969). At the time of decision in that case, as in this instance, there was no formal rule barring interference with the facilities in question.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

February 14, 1992

Released: February 18, 1992

Mitchell Rogovin, Esq. 8330-O
Donovan Leisure, 92010759
Rogovin, Huge & Schiller
1250 24th Street, N.W.
Washington, D.C. 20037-1124

Dear Mr. Rogovin:

This is in response to your recent complaint against station WMUR-TV, Manchester, New Hampshire, filed on behalf of Mr. Tom Laughlin, a legally qualified candidate for the office of President. You allege violations of the reasonable access provision of Section 312(a)(7) and the equal opportunity provision of Section 315(a) of the Communications Act of 1934, as amended. 47 U.S.C. Sections 312(a)(7) and 315(a).

You assert the following facts in your complaint. In late 1991, Mr. Laughlin purchased thirty-three, one-half hour programs on WMUR to air between January 8 and February 16, 1992, at various times (1:00 a.m. on weekdays and 7:00, 7:30, and 8:30 a.m. and 1:00 p.m. on weekends). In addition, Mr. Laughlin purchased one hour of program time on Sunday, February 16, 1992, at 9:30 p.m. WMUR subsequently rescheduled this one hour of program time to 10:30 p.m. on the same date because it was unwilling to preempt its Sunday night programming. WMUR also informed Mr. Laughlin that he could not broadcast live during his evening program on February 16, but would have to submit a taped program. On January 19, 1992, WMUR presented a live debate sponsored by the Democratic National Committee. Another live debate sponsored by the Democratic National Committee will be held on February 16, 1992. Mr. Laughlin has not been invited to participate in either debate.

You allege that WMUR violated the reasonable access provision of Section 312(a)(7) "because of its cancellation of television time for which it had contracted with Mr. Laughlin." You claim that the reasons provided for that cancellation violate the reasonable access provision. In addition, you claim that WMUR failed to provide equal opportunities to Mr. Laughlin in connection with the "debate" (apparently the February 16, 1992, debate). Although the nature of this claim is somewhat unclear, you apparently argue that WMUR's offer of "a taped program sometime after the live debate is finished," would not afford Mr. Laughlin a sufficient opportunity for a responsive broadcast.

DISCUSSION

Section 312(a)(7) of the Communications Act states:

> The Commission may revoke any station license or construction permit... for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

In the recent *Report and Order, In the Matter of Codification of the Commission's Political Programming Policies*, FCC 91-168, para. 8 (released December 23, 1991), 57 Fed. Reg. 189 (January 3, 1992) the Commission determined that it will continue to rely on the reasonable, good faith judgments of licensees to provide reasonable access to federal candidates, taking into account the guidelines set forth in *Carter/Mondale Presidential Committee, Inc.*, 44 FCC 2d 631, *recon. denied*, 74 FCC 2d 657 (1979), *aff'd sub. nom. CBS, In c. v. FCC*, 629 F.2d 1 (D.C. Cir. 1980), *aff'd*, 453 U.S. 367 (1981). The Supreme Court in *Carter/Mondale* stated that:

> If broadcasters take the appropriate factors into account and act reasonably and in good faith, their decisions will be entitled to deference even if the Commission's analysis would have differed in the first instance.

Id. at 387.

We first note that WMUR did not *cancel* program time purchased by Mr. Laughlin, but rather it *rescheduled* one hour of program time from 9:30 to 10:30 p.m. on the same date. While the total amount of program time provided to Mr. Laughlin (seventeen and one-half hours) was not affected by this rescheduling, he will receive thirty minutes as opposed to one hour of prime time programming. However, you do not allege that the total amount of program time, or the amount of prime time, provided to Mr. Laughlin is unreasonable. Rather, you claim that the 10:30 to 11:30 p.m. time period is unacceptable because it would result in a one hour delay between the debate and Mr. Laughlin's program.

The Commission has long held that:

> [A]lthough a candidate for Federal office is entitled under Section 312(a)(7) to varied broadcast times, such candidate is not entitled to a particular placement of his or her political announcement on a station's broadcast schedule... |T|here may be circumstances when a licensee might reasonably refuse broadcast time to political candidates during certain parts of the broadcast day. It is best left to the discretion of a licensee when and on what date a candidate's spot announcement or program should be aired.

Report and Order at para. 17 (citation omitted). Thus, it is clear that Mr. Laughlin is not entitled to the 9:30 to 10:30 p.m. time period on February 16. The reason WMUR allegedly gave for rescheduling -- its unwillingness to preempt its Sunday night programming -- is a factor specifically endorsed by the Supreme Court in *Carter/Mondale:*

"In responding to access requests... broadcasters may also give weight to such factors as... the disruptive impact on regular programming...." 453 U.S. at 387. Based on the facts before us, we are unable to find that WMUR's rescheduling of one hour of Mr. Laughlin's programming was unreasonable.

Section 315(a) of the Communications Act states, in pertinent part:

> (a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provision of this section. No obligation is hereby imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any
>
> (1) bona fide newscast,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),
>
> shall not be deemed to be use of a broadcasting station within the meaning of this subsection.

The Commission has held that debates are exempt from the equal opportunities provision of Section 315 in that they are considered to be on-the-spot coverage of bona fide news events. *Chisholm v. FCC*, 538 F.2d 349, 358 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976). Moreover, debates may be sponsored or initiated by broadcasters, candidates, third parties, and others and remain exempt from the equal opportunities provision. *Henry Geller*, 95 FCC 2d 1236 (1983), *aff'd sub nom., League of Women Voters v. FCC*, 731 F.2d 955 (D.C. Cir. 1983). When a broadcaster initiates a debate, it has the discretion to select as participants, based on objective criteria such as polling results, those candidates who are most significant. *See King Broadcasting Co.*, 6 FCC Rcd 4998 (1991). In *King*, the Commission said:

> The proposal before us contemplates appearances by the two major party presidential nominees only. However, we believe that exclusion of a major third-party presidential candidate who, based on objective criteria such as polling results showed the significance of his or her campaign, would call into question the bona fides of the broadcaster's selection of candidates.

Id. at 5000 (footnote omitted). In the affidavit attached to his complaint, Mr. Laughlin claims:

> Though a high ranking official of the Democratic party informed me that I was receiving greater voter approval than one or more candidates in the debate, I was still denied the opportunity to participate in the January 19, 1992 debate, even though one of the candidates I had passed in voter preference, Governor Wilder, had dropped out of the debate. As of the date of this affidavit, I have not been invited to participate in the February 16, 1992 debate.

This statement by Mr. Laughlin, reporting on a conversation with an unidentified official of the Democratic Party, falls far short of the strict standard established in *King* for challenging the broadcaster's selection of candidates to appear in an event for which it claims to be exempt from equal opportunities under Section 315(a)(4). The Commission in *King* was concerned that a candidate, who "through objective criteria such as polling results" could demonstrate that he or she was a "major" presidential candidate, not be excluded. Mr. Laughlin has not presented objective criteria sufficient to demonstrate that he is a major presidential candidate.

We do find, however, that one allegation in Mr. Laughlin's complaint raises questions about compliance with the Commission's policies. The Commission specifically stated, in *The Law of Political Broadcasting and Cablecasting: A Political Primer*, 100 FCC 2d 1476, 1511 (1984), that:

> A station may not require a candidate to appear "live" rather than by film or video recording. The same principle applies in reverse: A station may not require a candidate to appear on tape or film if he wants to appear "live. " However, if the station customarily charges extra for the production of live performances, it may charge a candidate on the same basis.

WMUR has allegedly informed Mr. Laughlin that he cannot broadcast live, but must instead present a taped program. Assuming Mr. Laughlin is willing to pay any production costs involved in a live broadcast, WMUR must allow Mr. Laughlin to broadcast live. Indeed, the staff of this Branch has contacted counsel for both parties to this complaint and has been assured that Mr. Laughlin will be allowed to broadcast live on February 16 at 10:30 p.m.

We also note that WMUR and Mr. Laughlin allegedly "agreed" that the television spots would be paid for two weeks in advance. On February 6, 1992, this Branch issued a ruling that allows a station to require candidates to pay, at most, one week in advance. Attached for your convenience is a copy of this ruling. We expect WMUR to modify its policies consistent with this ruling with respect to any remaining amounts owed, if any, by Mr. Laughlin or other candidates.

In view of the foregoing, your complaint IS DENIED to the extent set forth herein.

Staff action is taken here under delegated authority. Application for Review by the full Commission may be requested within thirty days of the date of this letter (see Commission Rule 1.4(b) [47 C.F.R. Section 1.4(b)]) by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be sent to the parties to the complaint. *See* Commission Rule 1.115 (47 C.F.R. Section 1.115).

Sincerely,

Milton O. Gross, Chief
Fairness/Political Programming Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Tariff F.C.C. No. 2	Transmittal Nos. 3733 and 3811

ORDER

Adopted: February 14, 1992; Released February 14, 1992

By the Chief, Common Carrier Bureau:

1. AT&T filed Transmittal No. 3733 on December 19, 1991, to introduce its Global 800 Customer Pricing Plan (GCPP). AT&T will provide 6 or 7 percent discounts on AT&T International 800 Service to GCPP customers who commit to two-year service terms with monthly minimum usage levels of $10,000 or $30,000, respectively. In addition, AT&T will provide a 30 percent discount off total usage charges generated during the 25th month of service to GCPP customers who complete their two-year commitments. Transmittal 3733 also introduces a promotion providing an additional 5 percent discount on all AT&T MEGACOM 800 Service-Canada usage to customers in eight Numbering Plan Areas (NPAs) who subscribe to GCPP between February 17 and March 17, 1992, request installation by April 1, 1992, and maintain an average of $15,000 per month usage of AT&T MEGACOM 800 Service-Canada for 12 consecutive months. On January 23, 1992, AT&T filed Transmittal No. 3811 to extend the length of the ordering period for the promotion from two weeks to four weeks. Transmittals 3733 and 3811 are scheduled to become effective on February 17, 1992.

2. On January 3, 1992, MCI Telecommunications Corporation (MCI) and US Sprint Communications Company Limited Partnership (Sprint) filed petitions to reject, or in the alternative, to suspend and investigate Transmittal 3733. AT&T replied to the petitions on January 13, 1992. The petitioners argue that Transmittal 3733 is anticompetitive because AT&T is leveraging its status as the dominant provider of 800 service to "lock-in" customers to term contracts extending beyond the anticipated date of full competition in the 800 number market. MCI Petition at 2-3; Sprint Petition at 2-4. MCI also argues that such locking-in of GCPP customers is an unreasonable practice under Section 201(b) of the Communications Act, 47 U.S.C. § 201(b), and is contrary to the Commission's finding in the *Interexchange Rulemaking*[1] and in the *GTE Airphone* case[2] MCI Petition at 6-7. The petitioners note that in the *Interexchange Rulemaking* the Commission required AT&T to remove the cancellation penalties from its existing Tariff 12 plans to prevent customers dependent on specific 800 numbers from being locked-in to long term commitments that would prevent them from taking advantage of 800 number portability upon its arrival. Sprint Petition at 3-4; MCI Petition at 3-5.

3. Sprint contends that AT&T's promotional offering should be suspended and investigated because the offering may be discriminatory. Sprint also argues that AT&T's promotion raises the same possibility of discrimination for which the Commission suspended and investigated AT&T's Transmittal No. 1922. Sprint Petition at 4-5.

4. In its reply, AT&T contends that a claim of leveraging must be based on a proof of market power and abuse of that power. AT&T claims it has demonstrated it does not possess market power in 800 services. AT&T Reply at 3-4. AT&T further contends that its promotional offering is not targeted to any single customer. According to AT&T, the promotion offered in this transmittal is similar to other narrowly focused offerings, such as Transmittal No. 3197, which have become effective without opposition. *Id.* at 7-8. AT&T then argues that the Commission's suspension Order in Transmittal 1922 was based on the discriminatory effect of price matching language in combination with a short ordering period, and thus is not relevant to Transmittal 3733. *Id.* at 9-10. Furthermore, states AT&T, it is increasing the ordering period to one month, the same length of time available in the Transmittal 3197 promotion that previously became effective. *Id.* at 10.

5. The Common Carrier Bureau has reviewed the transmittals and all associated pleadings. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to require rejection, and that no question has been presented that warrants investigation at this time.

6. Accordingly, IT IS ORDERED that the petitions to reject or suspend and investigate AT&T Tariff F.C.C. No. 2, Transmittal No. 3733, filed by MCI Telecommunications Corporation and US Sprint Communications Company Limited Partnership, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

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[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, FCC 91-251, 6 FCC Rcd 5880, 5905 (1991) (*Interexchange Rulemaking*), *reconsidered in part*, Memorandum and Opinion and Order, FCC 91-390, 6 FCC Rcd 7569 (1991), *further recon. pending.*

[2] Memorandum Opinion and Order, Gen. Docket No. 88-96, FCC 91-164, In the Matter of Amendment of the Commission's Rules Relative to the Allocation of the 849-851/894-896 MHz bands, 6 FCC Rcd 4435 (1991) (*GTE Airfone*). *See also* Application of GTE Airfone Incorporated, 6 FCC Rcd 4435 (1991).

Before the
Federal Communications Commission
Washington D.C. 20554

LETTER
February 14, 1992

Released: February 18, 1992

Arthur R. Block, Esq. 8330-O
250 West 57th Street 92020306
Suite 317
New York, NY 10019

Dear Mr. Block:

This is in response to your recent complaint against noncommercial stations WGBH-TV, Boston, Massachusetts, and WENHTV, Durham, New Hampshire, on behalf of Dr. Lenora B. Fulani, a legally qualified candidate for the Democratic nomination for the office of president in the New Hampshire primary. You complain that these two stations denied Dr. Fulani equal opportunities under Section 315(a) and reasonable access under Section 312(a)(7) of the Communications Act of 1934, as amended. 47 U.S.C. Sections 315(a) and 312(a)(7).

On February 5, 1992, you submitted letters to WGBH and WENH demanding that they provide Dr. Fulani with two hours of prime time programming prior to the New Hampshire primary. Your demand was based on the stations' broadcast on January 31, 1992, of a debate between five Democratic presidential candidates which was produced by MacNeil/Lehrer Productions and aired on PBS. You asserted four legal grounds for your demand. First, you claimed that the debate did not fall within the "on-the-spot coverage of bona fide news events" exemption to the equal opportunities requirement because the exclusion of Dr. Fulani from the debate was contrary to evidence of the significance of her candidacy, thus calling into question whether the stations exercised good faith news judgment in airing the debate. You cited to the amount of money Dr. Fulani raised in November and December, 1991, and the number of American citizens who have contributed to her campaign, as evidence of the significance of her candidacy. You also cited to a demonstration by 400 people and a petition signed by 5,225 New Hampshire registered voters protesting the exclusion of Dr. Fulani from other debates. You pointed out that voter surveys consistently report that the largest group of New Hampshire voters is "undecided. " Second, you asserted that the stations violated Section 399 of the Public Broadcasting Act of 1967 (47 U.S.C. Section 399) by broadcasting a debate that excluded a significant candidate. Third, you claimed that WGBH and WENH violated Section 501(c)(3) of the Internal Revenue Code by failing to invite Dr. Fulani to the debate. (We note, however, that you properly recognized that the Commission has no jurisdiction with respect to this claim.) Finally, you argued that the stations would be in violation of Section 312(a)(7) of the Communications Act if they granted Dr. Fulani any less than the two hours of prime time access afforded to her rivals (apparently referring to the debate).

In response to your demand letters, WGBH and WENH refused to provide Dr. Fulani with two hours of prime time programming, but offered her instead five minutes of access. Two reasons are given by the stations for denying your request and making their respective offers. First, they contend that Dr. Fulani's request, if granted, would have an extraordinarily disruptive impact on regular programming. Second, the licensees point out that there are thirty-six other candidates for the Democratic presidential nomination, twenty-six candidates for the Republican nomination, and four candidates for vice-presidential nominations by those parties. If Dr. Fulani were afforded two hours of prime time, the licensees note, they would be open to equal opportunities requests for up to another seventy-two hours of prime time, which would more than fill up all of the stations' prime time until the election.

DISCUSSION

Section 315(a) of the Communications Act states, in pertinent part:

> (a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station... Appearance by a legally qualified candidate on any --
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> (1) bona fide newscast,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto), shall not be deemed to be use of a broadcasting station within the meaning of this subsection.

In *King Broadcasting Co.*, the Commission noted that, in deciding whether a program is exempt, it will first determine whether it falls within one of the classes of appearance exempt under Section 315(a)(1)-(4). 6 FCC Rcd 4998, 4999 (1991). The Commission has held that debates are exempt from the equal opportunities provision of Section 315 in that they are considered to be on-the-spot coverage of bona fide news events. *Chisholm v. FCC*, 538 F.2d 349, 358 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976). Moreover, debates may be sponsored or initiated by broadcasters, candidates, third parties, and others and remain exempt from the equal opportunities provision. *Henry Geller*, 95 FCC 2d 1236 (1983), *aff'd sub nom., League of Women Voters v. FCC*, 731 F.2d 955 (D.C. Cir. 1983).

Second, the Commission explores whether a program which is claimed exempt was presented using a broadcaster's "good faith news judgment." *King Broadcasting Co.*, 6 FCC Rcd at 4999. The Commission further explained that:

> The second, "good faith" aspect of the analysis... places considerable reliance on the exercise of a broadcaster's journalistic discretion to determine

> "newsworthiness" once it is determined an exempt news event is involved. Thus, "absent evidence of the broadcaster's intent to advance a particular candidacy, the newsworthiness of an event is left to the reasonable news judgment of professionals."

Id. (citation omitted). As to the selection of participants to appear in an exempt program, the Commission said:

> The proposal before us contemplates appearances by the two major party presidential nominees only. However, we believe that exclusion of a major third-party presidential candidate who, based on objective criteria such as polling results showed the significance of his or her campaign, would call into question the bona fides of the broadcaster's selection of candidates.

Id. at 5000 (footnote omitted).

The evidence set forth in the "Fact Sheet on Candidacy of Dr. Lenora B. Fulani," attached to your complaint, falls far short of the strict standard established in *King* for challenging the selection of candidates to appear in an event which a station claims is exempt from equal opportunities under Section 315(a)(4). The Commission in *King* was concerned that a candidate, who "through objective criteria such as polling results" could demonstrate that he or she was a "major" presidential candidate, not be excluded. Dr. Fulani has not presented objective evidence sufficient to demonstrate that she is a major presidential candidate. The evidence you present demonstrates only that Dr. Fulani is an effective fundraiser, that voters in New Hampshire were concerned about her exclusion from the debate (not that they supported her nomination), and that there are a large group of undecided voters in New Hampshire. Indeed, you have provided the Commission with no information regarding Dr. Fulani's ratings in the polls, as compared to the ratings of the other Democratic presidential candidates, that would independently demonstrate that Dr. Fulani is a "major" candidate. *See George A. Lato, Esq.*, 6 FCC Rcd 5840 (1991).

You also claim that WGBH and WENH were "well aware" of the allegedly partisan actions of the New Hampshire Democratic Party in excluding Dr. Fulani and other significant "insurgent" Democratic candidates from previous debates. You claim that the stations have "adopted" MacNeil/Lehrer Production's decision to let the Democratic Party decide who is a "real Democrat," rather than exercising its own good faith news judgment. Once again, there is insufficient evidence to support this allegation. As the Commission made clear in *King*, a station's determination of the newsworthiness of an event will not be challenged absent evidence of the broadcaster's *intent* to advance a particular candidacy. No evidence of any intent by WGBH or WENH to advance a particular candidacy is presented.

Section 399 of the Communications Act states: "No noncommercial educational broadcasting station may support or oppose any candidate for political office." As noted above, you have failed to present any evidence that stations WGBH or WENH support or oppose any candidate for political office. Even if we accepted your claim that Dr. Fulani was wrongfully excluded from the January 31, 1992, debate, there is no evidence that her exclusion, and the airing of a debate with five candidates, constitutes support for, or opposition to, any particular candidate.

Section 312(a)(7) of the Communications Act states:

> The Commission may revoke any station license or construction permit... for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

The U.S. Supreme Court, in its landmark reasonable access decision, stated:

> In responding to access requests, however, broadcasters may also give weight to such factors as... the disruptive impact on regular programming, and the likelihood of requests for time by rival candidates under the equal opportunities provision of Section 315(a).

Carter/Mondale Presidential Committee, Inc., 44 FCC 2d 631, *recon. denied*, 74 FCC 2d 657 (1979), *aff'd sub nom. CBS, Inc. v. FCC*, 629 F.2d 1 (D.C. Cir. 1980), *aff'd*, 453 U.S. 367, 387 (1981).

The licensees' offers of five-minute program slots appear to be properly geared to circumstances articulated by the Court for evaluating reasonable access requests, such as substantial program disruption and the likelihood of a significant number of equal opportunities requests. The Court in *Carter/Mondale* stated that if the proper factors are considered in responding to a candidate's reasonable access request, and no evidence of bad faith is shown, it is not appropriate for the Commission to second-guess a licensee's determinations in responding to reasonable access requests even when the Commission might have reached a different conclusion:

> If broadcasters take the appropriate factors into account and act reasonably and in good faith, their decisions will be entitled to deference even if the Commission's analysis would have differed in the first instance.

Id. at 387. In the recent *Report and Order, In the Matter of Codification of the Commission's Political Programming Policies*, FCC 91-168, para. 8 (released December 23, 1991), 57 Fed. Reg. 189 (January 3, 1992), the Commission determined that it will continue to rely on the reasonable, good faith judgments of licensees to provide reasonable access to federal candidates, taking into account the guidelines set forth in *Carter/Mondale*.

In a recent decision involving a similar request by another candidate for three hours of prime time on stations WGBH, WENH, and one other noncommercial station, we determined that a counteroffer of five minutes of prime time programming was not unreasonable. *Michael Steven Levinson*, DA 92-187, released February 12, 1992. (A copy of this decision is attached.) Likewise, we cannot find that the the offers of WGBH and WENH to provide Dr. Fulani with five minutes of prime time programming are unreasonable.

We note that you base your request for two hours of prime time on the significance of Dr. Fulani's candidacy, and the granting of two hours of prime time access to her rivals. The significance of the candidacy of the requestor is not a factor that was determined by the Supreme Court to be relevant to a reasonable access request. *Carter/Mondale*, 453 U.S. 367. Moreover, the two hours of prime time "granted" to Dr. Fulani's rivals was not in response to a request by these candidates for reasonable access, but rather constituted coverage by the stations of a bona fide news event exempt from equal opportunities, as explained in greater detail above.

Based on the foregoing, your complaint against stations WGBH-TV and WENH-TV IS DENIED.

Staff action is taken here under delegated authority. Application for Review by the full Commission may be requested within thirty days of the date of this letter (see Commission Rule 1.4(b) [47 C.F.R. Section 1.4(b)]) by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be send to the parties to the complaint. *See* Commission Rule 1.115 (47 C.F.R. Section 1.115).

Sincerely,

Milton O. Gross, Chief
Fairness/Political Programming Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

GUY GANNETT PUBLISHING CO. (Assignor) — File Nos. BAL-911105HB, BALH-911105HC

and

PAXSON BROADCASTING OF MIAMI, L.P. (Assignee)

For Assignment of Licenses of WINZ(AM), Miami, Florida, and WZTA(FM), Miami Beach, Florida

MEMORANDUM OPINION AND ORDER

Adopted: February 20, 1992; Released: February 21, 1992

By the Commission:

I. INTRODUCTION

1. The Commission has before it the above-referenced applications for assignment of the licenses of WINZ(AM), Miami, Florida, and WZTA(FM), Miami Beach, Florida, from Guy Gannett Publishing Co. ("Gannett") to Paxson Broadcasting of Miami, L.P. ("Paxson"). Lowell W. Paxson owns 100% of the voting stock of Paxson Enterprises, Inc., the general partner of Paxson. Mr. Paxson also has an attributable interest in HSN Broadcasting of Hollywood, Florida, Inc., the licensee of WYHS(TV), Hollywood, Florida.[1] Since the Grade A contour of WYHS(TV) encompasses the entire communities of Miami and Miami Beach, a grant of the assignment applications would result in Mr. Paxson owning attributable interests in a television station and radio stations in the same market in violation of 47 C.F.R. § 73.3555(b), the Commission's one-to-a-market rule.[2] Paxson requests a waiver of the rule in connection with the proposed assignment. Kate Reinisch ("Petitioner"), a resident of Miami Beach, Florida, filed a petition to deny the application. Paxson and Gannett opposed that petition, and Petitioner replied.

II. THE PLEADINGS

2. In support of its waiver request, Paxson relies on the Commission's decision to look favorably upon television-radio combinations which meet the "Top 25 Markets/30 Voices" test set forth in *Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules ("Second Report and Order")*, 4 FCC Rcd 1741 (1989), *on reconsideration*, 4 FCC Rcd 6489 (1989). Paxson demonstrates that the Miami-Fort Lauderdale market, which includes Miami, Miami Beach, and Hollywood, is the 15th largest ADI television market, serving 1,326,100 ADI television households. Paxson also submits evidence that there will be 38 separately owned, operated, and controlled broadcast stations in the Miami area after the assignments of WINZ(AM) and WZTA(FM) are consummated. This evidence is derived from the Commission's ownership records and the *Broadcasting Yearbook*.

3. Petitioner opposes a grant of the requested waiver as contrary to the public interest. Petitioner alleges in her affidavit that she would be "adversely affected by any action of the FCC that would allow a single entity to exert ownership control over multiple media sources in the Miami metropolitan area in contravention of the Communications Act and FCC policy." Petitioner contends that joint ownership of the three stations would provide none of the public interest benefits the Commission envisioned when it adopted the top 25 markets/30 voices test. Petitioner notes that Paxson explicitly states in its waiver request that "the radio stations to be acquired will *not* be operated in combination with the TV station." Petitioner contends that the proposed operations will therefore enjoy no economies of scale due to co-location of studio or physical facilities, or from the sharing of staff. Petitioner argues that where, as here, it is evident on the face of the application that no efficiencies would result from grant of a one-to-a-market waiver, there is a substantial and material question of fact as to whether grant of the application would serve the public interest, and, therefore, the Commission must designate Paxson's application for hearing.

4. Petitioner also questions whether, in light of the proliferation of so-called local marketing agreements, or LMAs, Paxson can substantiate that the Miami-Ft. Lauderdale market has more than the 30 independently "owned, operated, and controlled" voices required to meet the top 25 markets/30 voices test. Petitioner notes that Paxson's showing addressed only questions of ownership. Petitioner points out that a station which leases most or all of its broadcast time to a competing station in the same market, while it may be controlled by the owner, "is, in reality, being *operated* by that competitor. " Petition, at 13. In addition to challenging Paxson's applica-

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[1] Mr. Paxson directly and indirectly owns approximately 32% of the common stock of Home Shopping Network, Inc. ("HSN"). HSN Communications, Inc., a wholly-owned subsidiary of HSN, is the parent corporation of HSN Broadcasting of Hollywood, Florida, Inc. According to Commission records, Mr. Paxson is not an officer or director of HSN. Mr. Paxson has entered into an agreement with Roy Speer, Chairman, Chief Executive Officer, and Director of HSN, and a stockholder of HSN, pursuant to which they have agreed to vote their stockholdings in unison. In the event of a disagreement on a particular matter, Mr. Speer casts the deciding vote.

[2] Section 73.3555(b) of the Commission's Rules prohibits the common ownership of radio and television stations in the same market if the 2 mV/m contour of an AM station or the 1 mV/m contour of an FM station encompasses the entire community of license of a television station or, conversely, if the Grade A contour of a television station encompasses the entire community of license of an AM or FM station.

tion, Petitioner asks the Commission to re-examine the continuing validity of the 30 voices test, given current policies regarding LMAs.

5. In their oppositions, Gannett and Paxson argue, based on the Commission's *Second Report and Order* and subsequent cases, that where the proponent of a one-to-a-market waiver establishes the existence of more than 30 voices in a top 25 market, there need be no demonstration that particular efficiencies will result from the acquisition. Gannett and Paxson note that, in any event, Petitioner has made no showing that the Commission's goals of preserving diversity and competition will be significantly harmed by grant of a waiver. They maintain that because the affected radio stations will be separately operated, there is significantly less potential for harm to these goals than if the acquisition would result in efficiencies achieved through the consolidation of the operations of several stations.

6. With respect to the issue of LMAs, Paxson and Gannett argue that Petitioner's speculation that there may be a sufficiently large number of LMAs in the market to undermine the waiver showing is both immaterial and unsupported by specific allegations of fact. Gannett notes that, when the Commission adopted the top 25 markets/30 voices test, it stated that it would use the attribution provisions of the local ownership rules to determine the number of separate voices in a market. Gannett and Paxson observe that LMAs create no attributable interest under these rules, and are thus not cognizable for purposes of the top 25 markets/30 voices test. Gannett submits an affidavit from the General Manager of its stations in Miami and Miami Beach, Timothy Williams. Mr. Williams states that he is aware of only two stations in the Miami market that broker substantial parts of their broadcast day to third-party programmers. Gannett and Paxson also note that, to be acceptable under Commission Rules, LMAs must provide adequate safeguards to insure that station licensees retain ultimate operational control. They argue that, in such circumstances, a showing concerning LMAs would be superfluous.

7. In her reply, Petitioner again argues that "since Paxson does not even attempt to show that there will be economic efficiencies created by the cross-ownership in this case, or that the public will benefit therefrom, the waiver must be denied." Reply, at 9. Petitioner argues that she is not required to submit specific factual allegations. She observes that Paxson's statement that the stations will be operated separately proves that there will be no significant efficiencies benefitting the public as a result of the transaction. She also observes that she need not show actual harm resulting from the transaction, since such harm to diversity is presumed by the existence of the one-to-a-market rule. She argues that, despite Paxson's claim that the stations will be operated separately, Paxson's ownership interest necessarily carries with it the potential for Paxson to exercise substantial influence and control over station operations. Turning to the issue of LMAs, Petitioner argues that, because Paxson seeks a waiver of the Commission's rules, it is incumbent on Paxson to submit evidence concerning the absence of LMAs in the Miami market. Petitioner contends that, regardless of whether an interest in a station is attributable, "it stretches reality to claim that two or more stations carrying the same exact programming in the same market are separate voices simply because the ownership of each station is different." Reply, at 8.

III. DISCUSSION

8. The Commission, in the *Second Report and Order*, set forth the standards for reviewing waivers of the "one-to-a-market" rule. The Commission concluded that it would "look favorably upon waiver requests when the radio and television stations involved are located in the top 25 ADI television markets as defined by Arbitron Ratings Company and in addition where, following the proposed combination, there will remain at least 30 separately owned, operated and controlled broadcast licensees or 'voices'." *Second Report and Order*, 4 FCC Rcd 1741, 1751 (1989). We also indicated that, in examining such requests, "we will use the attribution provisions of our local ownership rules to determine the number of separately owned, operated, and controlled broadcast licensees or voices in the relevant television or metro market." *Id.* (footnotes omitted). In this case, Paxson has provided the necessary documentation, based upon our attribution rules, to establish a prima facie case that its waiver request satisfies the "top 25 markets/30 voices" standard, and therefore should be granted. The applicants having carried the burden of providing prima facie evidence that the waiver should be granted, we turn next to the Petitioner's contentions.

9. In examining the contentions before us, we are guided by Section 309(d) of the Communications Act. Section 309(d) establishes what has been described as a two-step process. *See Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988). In the first step, the Commission determines whether there are specific allegations of fact that, if true, would demonstrate that grant of the application would be *prima facie* inconsistent with the public interest. If so, then the Commission proceeds to examine and weigh all of the material before it to determine whether there is a substantial and material question of fact requiring resolution in a hearing. For the reasons set forth below, we conclude that the matters raised by the application and by the Petitioner do not present such a *prima facie* case or do not otherwise raise substantial and material questions of fact that would require resolution in a hearing.

10. We examine first Petitioner's arguments concerning the lack of any showing from the applicants as to efficiencies that would flow from approval of the waiver request. We observe that Petitioner submits no specific allegations of fact, instead relying on evidence submitted by the applicants, and the general concerns underlying our rules. In adopting our general top 25 markets/30 voices standard for one-to-a-market waivers, we stated:

> We will be predisposed to grant waiver requests that meet this standard, and we generally do not intend to scrutinize these applications for economic efficiencies because we have already determined that such efficiencies generally exist and that the benefits of permitting radio-TV combinations in these markets with many competing voices will generally not undermine the benefits flowing from our traditional procompetitive and diversity policies. This conclusion is based on the fact that a very large number of broadcast outlets and separate voices will remain in these large markets, thereby preventing any single outlet or firm from obtaining undue economic power or undue sway over public opinion. Indeed, we believe that our... standard is conservative and may

far exceed the market size and the number of voices necessary to ensure diversity and prevent competitive abuses.

4 FCC Rcd at 1751. Thus, we clearly declined to require any showing with respect to efficiencies in connection with requests for waivers under the top 25 markets/30 voices test. We believe it would be patently unfair to the applicants to alter now the course set in the *Second Report and Order*, and unnecessary to achieve our statutory and public policy goals.

11. Petitioner correctly observes that, because, by the applicant's own admission, the stations in question would be operated separately, approval of the instant transaction would not result in the specific types of efficiencies we listed as examples in the *Second Report and Order*, such as studio or staff consolidations. However, our listing of potential efficiencies in the *Second Report and Order* was meant to be exemplary, not exhaustive, and our action was premised on the general existence of efficiencies as a result of combined ownership.[3] As a general matter, we believe that significant efficiencies may result from the holding of interests by a single individual in radio and television stations in the same market, even if the stations will be operated separately. An owner may, through experience gained in connection with owning one station in a market, possess specialized knowledge concerning that market, or concerning broadcast operations in general. For example, an owner may have gained through experience knowledge concerning the labor pool in a specific market, and effective recruitment sources. That knowledge would significantly enhance the licensee's ability to direct critical hiring and firing decisions, and is likely to significantly reduce the cost of its decision making. Furthermore, even if an applicant has no knowledge concerning specific market conditions, or has not previously been an owner in the market, the relative cost of acquiring that knowledge is decreased by ownership of more than one station because the cost of acquiring that knowledge can be spread over more than one station. Accordingly, we decline to draw any adverse inferences regarding the potential efficiencies that would flow from grant of the waiver request, or from the fact that Paxson, consistent with established Commission guidelines, did not submit a showing addressing specific efficiencies. Moreover, the fact that Paxson's interest in HSN is less than a controlling interest only strengthens the conclusion that potential efficiencies will outweigh any potential detriments to the diversity concerns underlying the rule.

12. We turn next to the Petitioners' argument that, in light of the proliferation of LMAs, and the fact that stations involved in LMAs are not, in reality, separately operated, the applicants must affirmatively demonstrate that there are not only 30 separately owned and controlled voices in the market, but also 30 separately operated voices. In this connection, we reiterate that when we adopted the top 25 markets/30 voices test, we stated we would "use the attribution provisions of our local ownership rules to determine the number of separately owned, operated, and controlled broadcast licensees or voices in the relevant television or metro market." *Id.* (footnotes omitted).[4] We included a requirement concerning station operations to foreclose the possibility that non-operational stations would be counted as a voice.[5] This requirement was not intended to impose on applicants seeking a top 25 markets/30 voices waiver the burden of addressing details of operation and control at the numerous stations in the market, details which they likely could not know but nevertheless would be required to address were we to accept Petitioner's contention. Indeed, in adopting this standard, we rejected alternatives which would have been more burdensome, stating that, in light of the "cautious approach" we were taking, we saw "no need to impose such additional burdens." We also observed that "[our] standard is stringent enough to provide a 'safety net' in terms of our fundamental diversity and competition concerns." *Id.* at 1752.

13. In light of this safety net, and the fact that the number of voices in the Miami market calculated using our attribution standards substantially exceeds the 30 voice threshold, we conclude that it is unnecessary in this proceeding to alter our established standard, and either require additional information of the applicant or explore the matter further in a hearing.[6] Gannett has submitted evidence that only two stations in the Miami market engage in brokerage of substantial parts of their broadcast days to third-party programmers. This evidence is unrebutted. The existence of LMAs involving common programming would be readily apparent from listening to or watching stations in the market, or from examining program listings in the market, if non-commonly owned stations were duplicating substantial amounts of each other's programming. The evidence of record thus dispels any concerns we may have had in this case that our safety net is inadequate.[7]

14. For these reasons, we conclude that grant of the instant application would be consistent with the Communications Act and our rules and policies. We find that the

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[3] One-to-a-market cases typically involve proposals to bring radio and television stations under common control. Because Paxson will control the radio stations but not HSN, see footnote 1, above, he is not in the position to compel the kinds of efficiencies normally associated with one-to-a-market cases, such as common facilities and staff.

[4] Petitioner has submitted no factual allegations to challenge the applicant's showing that, based on our attribution rules, this standard is met.

[5] *Id.* at n. 86. There is no allegation in this case that any of the 38 voices Paxson relies on to meet our standard are non-operational.

[6] We decline to reach any conclusion in this proceeding that particular types of LMAs, or LMAs in general, either serve or disserve the public interest. No part of the instant transaction involves an LMA. We have sought public comment on issues related to LMAs in a separate proceeding, and they are best resolved in the context of that proceeding, in light of a fully developed record. *See Revision of Radio Rules and Policies*, 6 FCC Rcd 3275, 3281-83 (1991). We also decline to undertake any general reassessment of our top 25 markets/30 voices standard, since the facts in this case do not warrant any departure from that standard.

[7] We note that there are no allegations in this case that any licensee in the Miami market has ceded ultimate control over key operational details, such as finances, personnel, or programming, to another station in the market. Even if there were such allegations, we believe the appropriate course of action would be to take enforcement action against the offending parties, consistent with the statutory ban on unauthorized transfers of control.

applicant is legally, financially, and otherwise qualified, and that a grant of the assignment applications would serve the public interest.

15. Accordingly, IT IS ORDERED, That the "Petition to Deny Application for Consent to Assignment of License" filed by Kate Reinisch IS HEREBY DENIED.

16. IT IS FURTHER ORDERED, That the request for waiver of the Commission's one-to-a-market rule, 47 C.F.R. § 73.3555(b), IS HEREBY GRANTED, and the applications for assignment of the licenses of WINZ(AM), Miami, Florida, and WZTA(FM), Miami Beach, Florida, from Guy Gannett Publishing Co. to Paxson Broadcasting of Miami, L. P. ARE HEREBY GRANTED.[8]

FEDERAL COMMUNICATIONS COMMISSION

Donna Searcy
Secretary

[8] In granting the license renewal applications of WINZ(FM) and WZTA(FM), the Commission, in *Guy Gannett Publishing Co.*, released November 29, 1991 (Chief, MMB), noted the pendency of the instant assignment applications and stated that upon consummation, the EEO reporting conditions set forth therein will be the responsibility of Paxson.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-555

In the Matter of

Amendment of Section 73.202(b), RM-7453
Table of Allotments,
FM Broadcast Stations.
(Mineral Wells and Winters, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 25, 1992; Released: March 6, 1992

By the Assistant Chief, Allocations Branch:

1. At the request of Jerry Snyder and Associates, Inc. ("petitioner"), licensee of Station KYXS-FM, Channel 240A, Mineral Wells, Texas, the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 6960 (1990), proposing the substitution of Channel 240C1 for Channel 240A at Mineral Wells and modification of Station KYXS-FM's license to specify operation on the higher powered channel.[1] In order to accommodate the allotment of Channel 240C2 to Mineral Wells, petitioner also requested the substitution of Channel 241A for vacant Channel 240A at Winters, Texas.[2] Petitioner filed comments stating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 240C1 for Channel 240C3 at Mineral Wells, and by substituting Channel 241A for Channel 240A at Winters, since it would provide Mineral Wells with an expanded coverage area FM service. Channel 240C1 can be allotted to Mineral Wells in compliance with the Commission's minimum distance separation requirements with a site restriction of 14.2 kilometers (8.8 miles) south to accommodate petitioner's desired site.[3] Channel 241A can be substituted for Channel 240A at Winters, Texas, consistent with the minimum distance separation requirements at the city reference coordinates.[4] Since Winters is located within 320 kilometers (199 miles) of the U.S.-Mexican border, concurrence of the Mexican government has been obtained for this allotment. As proposed, we will also modify Station KYXS-FM's license to specify operation on Channel 240C1 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 20, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Mineral Wells, Texas	240C1
Winters, Texas	241A

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Jerry Snyder and Associates, Inc., for Station KYXS-FM, Mineral Wells, Texas, IS MODIFIED to specify operation on Channel 240C1, in lieu of Channel 240C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the applicant for Channel 240A, Winters, Texas, as follows: AFM Associates, P.O. Box 736, Myrtle Beach, South Carolina 29577.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

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[1] In a separate proceeding, the license of Station KYXS-FM was modified to specify operation on Channel 240C3. *See Report and Order*, 5 FCC Rcd 2152 (1990).

[2] An application (ARN-881209MK) for Channel 240A at Winters was filed by AFM Associates ("AFM") but was returned by the Commission. On June 12, 1989, a petition for reconsideration of that action was filed by AFM. If reconsideration is granted, AFM will be permitted to amend its application to specify Channel 241A at Winters. This may be achieved without loss of "cutoff" status since no upgrade in the class of channel will result. *See Salamanca, NY and Bradford, PA*, 50 FR 26208, June 25, 1985, and *Sanibel, FL*, 50 FR 32706, August 14, 1985. We will serve AFM with a copy of this *Report and Order*.

[3] The coordinates for Channel 240C1 at Mineral Wells are North Latitude 32-41-06 and West Longitude 98-09-32.

[4] The coordinates for Channel 241A at Winters are North Latitude 31-57-36 and West Longitude 99-57-54.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-323

In the Matter of

Amendment of Section 73.202(b). RM-7850
Table of Allotments,
FM Broadcast Stations.
(Clarksville, Virginia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 26, 1992; Released: March 6, 1992

By the Assistant Chief, Allocations Branch:

1. At the request of Clarksville Broadcasting Company, Inc., ("petitioner"), licensee of Station WLCQ-FM, Channel 252A, Clarksville, Virginia, the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 6644 (1991), proposing the substitution of Channel 252C3 for Channel 252A at Clarksville, and the modification of Station WLCQ-FM's license to specify operation on the higher powered channel. Petitioner filed comments stating its intention to apply for channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 252C3 for Channel 252A at Clarksville, since it could enable Station WLCQ-FM to expand its coverage area. Channel 252C3 can be allotted to Clarksville in compliance with the Commission's minimum distance separation requirements with a site restriction of 18.3 kilometers (11.4 miles) northwest to accommodate petitioner's desired transmitter site.[1] However, the issuance of a license for Channel 252C3 may be withheld until Station WGOL-FM, Channel 252A, Lynchburg, Virginia, is licensed on Channel 250C3. [2] As proposed, we will also modify Station WLCQ-FM's license to specify operation on Channel 252C3 in accordance with the provisions of Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 20, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Clarksville, Virginia	252C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Clarksville Broadcasting Company, Inc., for Station WLCQ-FM, Clarksville, Virginia, IS MODIFIED to specify operation on Channel 252C3, in lieu of Channel 252A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Clarksville Broadcasting Company, Inc., licensee of Station WLCQ-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Report and Order* to the licensee of Station WGOL-FM, Lynchburg, Virginia, as follows: Douglas Broadcasting Inc., P.O. Box 11529, Lynchburg, Virginia 24506.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 252C3 at Clarksville are North Latitude 36-42-30 and West Longitude 78-44-00.

[2] Station WGOL-FM was modified from Channel 252A to Channel 250C3 in MM Docket No. 90-553. *See* 6 FCC Rcd 944 (1991). A construction permit has been issued to Station WGOL-FM specifying operation on Channel 250C3 (BPH-911023IA). We will serve the licensee of Station WGOL-FM with a copy of this *Report and Order*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-264

In the Matter of

Amendment of Section 73.202(b),	RM-6933
Table of Allotments,	RM-6812
FM Broadcast Stations	RM-6741
(Chariton, Bloomfield, and Melcher, Iowa)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 27, 1992; Released: March 6, 1992

By the Chief, Allocations Branch:

1. The Commission has before it the omnibus *Notice of Proposed Rule Making* in which we proposed, on our own motion, 149 Class C3 upgrades of existing Class A stations. 4 FCC Rcd 4904 (1989).[2] That *Notice* encompassed MM Docket Nos. 89-133 through 89-281.[3] In this *Report and Order,* we are considering the proposed substitution of Channel 288C3 for Channel 288A at Chariton, Iowa, and modification of the license of Station KELR-FM, Chariton, Iowa, to specify operation on Channel 288C3. For the reasons discussed below, we are upgrading Station KELR-FM to specify operation on Channel 287C2. In a related context, we are substituting Channel 292C3 for Channel 292A at Bloomfield, Iowa, and are modifying the license of Station KXOF-FM, Bloomfield, Iowa, to specify operation on Channel 292C3. Finally, we are dismissing the petition for rule making filed by the Iowa Bible Study Group proposing the allotment of Channel 291A to Melcher, Iowa.

2. In response to the *Notice*, Dwaine F. Meyer ("Meyer"), licensee of Station KELR-FM, filed comments supporting the Channel 288C3 upgrade at Chariton. In his comments, Meyer also referred to his pending petition for rule making (RM-6933 proposing a Channel 287C2 upgrade for Station KELR-FM, and indicating a preference for that upgrade proposal. We are also in receipt of two other related petitions for rule making. The first petition for rule making (RM-6741) was filed by the Iowa Bible Study Group proposing a Channel 291A allotment to Melcher, Iowa.[4] This petition conflicted with the proposed Channel 288C3 upgrade at Chariton. The second petition for rule making (RM-6812) was filed by Meyer in his capacity as the licensee of Station KXOF-FM, Channel 292A, Bloomfield, Iowa.[5] That petition for rule making proposed the substitution of Channel 292C3 at Bloomfield, and modification of the Station KXOF-FM license to specify operation on Channel 292C3. The Channel 292C3 upgrade at Bloomfield conflicted with the proposed Channel 291A allotment at Melcher. We are processing all three petitions for rule making as timely counterproposals in this proceeding.[6]

3. On October 31, 1991, the Iowa Bible Study Group withdrew its petition for rule making proposing a Channel 291A allotment at Melcher, Iowa.[7] As a consequence of this withdrawal, there is no longer any impediment to the proposed upgrades at Chariton and Bloomfield. The Channel 287C2 upgrade at Chariton and the Channel 292C3 upgrade at Bloomfield can be allotted in compliance with the Commission's minimum spacing requirements, and would serve the public interest by providing both of these communities with wide-area FM services.[8]

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[1] The communities of Bloomfield and Melcher have been added to the caption.

[2] The FAA filed comments addressed to all of the communities under consideration as a whole, rather than denoting specific areas or communities of concern. These comments were not served on the individual parties. As such, these comments violate the Commission's *ex parte* rules, and will not be considered as a separate filing in this proceeding. *See* 47 CFR § 1.1200, *et seq.*

[3] The *Notice* was an outgrowth of the *First Report and Order* in MM Docket No. 88-375 which created Class C3 as an additional class of FM allotment. 4 FCC Rcd 2792 (1989). The *First Report and Order* identified a number of existing Class A stations which could be upgraded to Class C3 without requiring a change in transmitter site or operating frequency, and could be upgraded without precluding any other FM stations from upgrading on their present channels at their present sites. Under Section 1.420(g) of the Commission's Rules, a Class A FM station would be able to upgrade to Class C3 on its co-channel or mutually exclusive adjacent channel without entertaining competing expressions of interest for the upgraded allotment. However, counterproposals could have been filed proposing the allotment of a mutually exclusive channel at another location.

[4] Originally, the Iowa Bible Study Group proposed a Channel 241A allotment at Melcher. Prior to the comment date in this proceeding, the petition for rule making was modified to specify Channel 291A.

[5] The Station KXOF-FM license was assigned to Horizon Broadcasting, Inc. on July 19, 1989, (File No. BALH-890417GV). On August 30, 1989, Horizon Broadcasting filed a "Substitution of Petitioner" reflecting this fact and its desire to pursue the proposed upgrade at Bloomfield, Iowa. In a related context, Horizon Broadcasting, Inc. filed supplemental comments which, in essence, pertain to possible restrictions necessitated by its conflict with the proposed Channel 291A allotment at Melcher.

[6] Public Notice of these counterproposals was given on August 18, 1989 (Report No. 1791).

[7] Subsequently, the Iowa Bible Study Group filed a declaration pursuant to Section 1.420(j) of the Rules stating that it had received no consideration or promise of future consideration for its withdrawal.

[8] The reference coordinates for the Channel 287C2 allotment at Chariton, Iowa, are 41-00-50 and 93-17-23. The reference coordinates for the Channel 292C3 allotment at Bloomfield, Iowa, are 40-44-40 and 92-22-19. These coordinates were set forth by Horizon Broadcasting, Inc. in supplemental comments. Since the petition which resulted in the allotment of Channel 292C3 to Bloomfield, Iowa, was filed prior to October 2, 1989, the licensee of Station KXOF-FM may avail itself of the provisions of Section 73.213(c)(1) of the Commission's Rules with respect to Station KCII-FM, Channel 291A, Washington, Iowa, and Station KDAM-FM, Channel 292A, Monroe City, Missouri.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 20, 1992,** the FM Table of Allotments, Section 73.202(b) of the Rules, IS AMENDED for the communities listed below, to read as follows:

Community	Channel No.
Chariton, Iowa	287C2
Bloomfield, Iowa	292C3

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KELR-FM, Channel 288A, Chariton, Iowa, IS MODIFIED to specify operation on Channel 287C2 in lieu of Channel 288A, subject to the following conditions:

(a) The licensee shall submit to the Commission a minor change application for a construction permit (FCC Form 301) specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 1.1620 of the Commission's Rules.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KXOF-FM, Channel 292A, Bloomfield, Iowa, IS MODIFIED to specify operation on Channel 292C3 in lieu of Channel 292A, subject to the following conditions:

(a) The licensee shall submit to the Commission a minor change application for a construction permit (FCC Form 301) specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 1.1620 of the Commission's Rules.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That the aforementioned petition for rule making filed by the Iowa Bible Study Group (RM-6741) IS DISMISSED.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-345

In the Matter of

Amendment of Section 73.202(b), RM-7109
Table of Allotments,
FM Broadcast Stations.
(Dade City, Florida)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 27, 1992; Released: March 6, 1992

By the Assistant Chief, Allocations Branch:

1. Pursuant to the request of Daniel A. and Paula C. Bernath, the Commission has before it for consideration the *Notice of Proposed Rule Making*, 6 FCC Rcd 7117 (1991), proposing the allotment of Channel 241A to Dade City, Florida, as that community's first local FM service. Dade City Radio Partners filed supporting comments in response to the *Notice*. No other comments were received.

2. We believe the public interest would be served by the allotment of Channel 241A to Dade City, Florida, since it could provide the community with its first local FM service. Channel 241A can be allotted to Dade City in compliance with the Commission's minimum distance separation requirements with a site restriction of 5.4 kilometers (3.4 miles) east[1] in order to avoid short-spacings to Station WMTX(FM), Channel 239C1, Clearwater, Florida, and Station WRXK(FM), Channel 241C, Bonita Springs, Florida.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 20, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Dade City, Florida	241A

4. The window period for filing applications will open on **April 21, 1992,** and close on **May 21, 1992.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Dade City are North Latitude 28-22-15 and West Longitude 82-08-05. Because the petition which resulted in this allotment was filed prior to October 2, 1989, applicants may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's Rules with respect to Station WMTX(FM), Channel 239C1, Clearwater, Florida, at coordinates 27-52-00 and 82-37-27, Station WRXK(FM), Channel 241C, Bonita Springs, Florida, at coordinates 26-25-22 and 81-37-49, and Station WEJZ(FM), Channel 241C, Jacksonville, Florida, at 30-19-22 and 81-38-34.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-591

In re Application of

NANCY NALESZKIEWICZ — File No. 10494-CL-P-430-A-89

For a Construction Permit to establish a new cellular system to operate on Frequency Block A in the Domestic Public Cellular Telecommunications Radio Service to serve the Kansas - 3 (Jewell) Rural Service Area

MEMORANDUM OPINION AND ORDER

Adopted: February 27, 1992; Released: March 6, 1992

By the Commission: Commissioner Marshall dissenting.

1. We have before us an application filed on September 16, 1991 by Nancy Naleszkiewicz (appellant) for review of a Memorandum Opinion and Order of the Review Board, *Nancy Naleszkiewicz*, 6 FCC Rcd 4829 (Rev. Bd. 1991), which affirms a prior order by the presiding ALJ, FCC 91M-1790 (rel. June 4, 1991), dismissing her application for a construction permit for abuse of process.[1] For the reasons stated in the following opinion, we will grant the application for review and reinstate the appellant's application.

BACKGROUND

2. This proceeding was designated for hearing on character issues to determine whether the appellant, a winning cellular radio telephone lottery applicant, is qualified to be a Commission licensee. *Hearing Designation Order*, 5 FCC Rcd 7131, 7138 (1990) (HDO). The character issues pertain to circumstances stemming from the activities of Genesis Enterprises, Ltd., of which the appellant and her husband are the sole owners and officers, that led to federal indictment of Genesis (and the husband) on charges of mail fraud and false statements. *Id.* at 7132.[2]

3. The HDO, a nineteen-page document that was publicly released on November 26, 1990 and mailed to the appellant, contained this statement in its sixty-second paragraph: "The applicant and the parties may avail themselves of an opportunity to be heard by filing written notices of appearance under Section 1.221 of the Commission's rules within 20 days of the mailing of this order by the Secretary." *Id.*

4. At the prehearing conference, on January 30, 1991, some 45 days past the deadline for filing notices of appearance, Sheldon P. Schuman, whom the appellant had retained to represent her in this proceeding, filed a notice of appearance on her behalf and an associated motion for acceptance. The motion stated as follows regarding the failure to file the notice on time:

> Mrs. Naleszkiewicz's former law firm, Sullivan & Worcester, advised her that they would not represent her at the Administrative Hearing.
>
> [Mrs. Naleszkiewicz] is not an attorney and was unaware that the Rules required her to notify the Commission that she intended to appear . . . and present evidence within 20 days of the order. Her husband . . . was sentenced in . . . Court on January 18, 1991 and she was pre-occupied helping him prepare for his sentencing.
>
> Subsequently, she has just retained Sheldon P. Schuman to represent her in connection with the hearing.

The presiding ALJ granted the motion for acceptance because he concluded that the delay in filing the notice had not been prejudicial or disruptive. FCC 91M-1025 (rel. March 21, 1991).

5. On May 8, the intervenors, PNC and CFL, filed a joint motion to dismiss the appellant's application, contending that three documents obtained from her in discovery revealed that key allegations in her motion for acceptance were deliberate falsehoods. One of the documents to which they referred was a copy of a FAX transmission of the HDO sent from the appellant's former counsel, Sullivan & Worcester, to the appellant on November 26, 1990. This, the intervenors argued, showed that the appellant had had actual knowledge of the HDO's contents prior to the filing deadline, including the requirement in ¶ 62 regarding notices of appearance. The second document was a letter dated December 7, 1990 from William L. Fishman, an attorney with the firm of Sullivan & Worcester, to the appellant, the pertinent portion of which is as follows:

> Dear Nancy:
>
> Enclosed you will find an Order . . . establishing dates for a prehearing conference and the hearing in connection with your Kansas-3 (Jewell) RSA application. An FCC Staff Notice of Appearance is also enclosed. [The referenced enclosure was a copy of a notice of appearance that another party had filed.] Your counsel should file a Notice of Appearance at the FCC as provided in Para. 62 of the Hearing Designation Order. As I have indicated to you previously, as a result of potential conflicts of interest . . . we will be unable to represent you in this proceeding.
>
> We are available, on a limited and background basis, to assist the counsel you have retained to represent you in this matter . . . .

The intervenors maintained that this letter impeached the appellant's statement in the January 30 motion that she had "just" retained Mr. Schuman, as the letter assertedly showed, by referring in the past tense to her engagement of substitute counsel and by indicating below the subscription that a copy was being sent to Mr. Schuman, that the appellant had engaged Schuman prior to the date of

the letter, *i.e.*, prior to December 7. Further, the intervenors maintained that the letter belied the plea of ignorance in the January 30 motion because it explicitly advised the appellant that her counsel should file a notice of appearance and cited the paragraph of the HDO that specifies the filing deadline.

6. The third document to which the intervenors referred in their joint motion to dismiss was a letter dated January 3, 1991 from the appellant, Mrs. Naleszkiewicz, to Sheldon Schuman, the pertinent parts of which are reproduced below:

> As you know, the FCC has designated the issuance of a Construction Permit for my win of Kansas 3 RSA for a hearing . . . see the attached FCC order.
>
> Also, as you know, Bill Fishman . . . who has been handling my representation at the FCC until now cannot represent me in that hearing due to a potential conflict of interest. (*See* attached letter.)
>
> I would like to ask you to represent me during the FCC administrative proceedings. You have an enormous advantage not only because Genesis has been your client for five years now and also because you are thoroughly familiar with the case at hand.
>
> At present our cash flow situation, both at the company and personnally is rather limited . . . . I need a counsel who has to formally notify the Commission of his intention to appear on my behalf in the above proceeding. At this time I feel it would be only appropriate to offer a collateral that would guarantee a payment for your professional services. . . . I would like to offer as such collateral and/or security our minority interest in Benton Harbor MSA. . . . [T]he approximate value of that minority interest is $40,000.00. . . .
>
> Both Wladimir [the appellant's husband] and I . . . would . . . sign a formal Assignment and/or pledge as a security.

According to the intervenors, this letter proves beyond doubt that the appellant knew of the notice of appearance requirement well before January 30, as she mentioned it to Schuman in the letter.

7. In an opposition filed on May 13, 1991 and attested by Mr. Schuman and the appellant, the appellant acknowledged having received the letter from Fishman dated December 7, 1990 but denied that she had known at any relevant time about the deadline for filing notices of appearance. The opposition alleged that the appellant lacked the legal ability to fully comprehend the HDO and had been preoccupied during the period in question with the possibility that her husband would be given a jail sentence, that she had not retained Mr. Schuman to represent her in this proceeding until January 26, 1991, and that he had not become involved in any substantive aspect of the case until then. The opposition further alleged that there were two reasons why the appellant had not secured Schuman's services sooner: first, she had erroneously believed that she merely needed to retain an attorney to appear at the pre-trial conference on January 30 and that there was no need to hire one much before that date since the conference would be purely procedural and would require little advance preparation; second, the appellant did not at first have enough available cash to pay a retainer, as shown by the proposal in her letter to Schuman of January 3 to pledge a security interest in certain property in lieu of paying a cash retainer fee. The opposition further alleged that the appellant finally borrowed $5,000 from a relative in order to pay Schuman's retainer fee with a postdated check.

8. In reply, the intervenors argued, among other things, that the appellant's assertion that she had not engaged Schuman's services for this case until January 26 elevated form over substance, inasmuch as he had represented Genesis in cellular matters for five years and was, in the appellant's own words, thoroughly familiar with the case at hand.

9. The intervenors also argued that it is unlikely that the appellant was distracted by concern about developments in the criminal prosecution of her husband from paying attention to the procedural requirements of this case, in view of the fact that the criminal prosecution had been pending for nearly 18 months as of January 1991 and in view of the fact that the viability of the instant application afforded her husband leverage in bargaining with the prosecutor to avoid incarceration.

10. In sum, the intervenors charged the appellant with making three deliberate misrepresentations to the Commission in order to persuade it to accept the late-filed notice of appearance: (1) the representation in the January 30 motion for acceptance that she had been without benefit of counsel just prior to that date; (2) the statement in the same motion that she had been unaware that notices of appearance were due within 20 days of the HDO's release; and (3) the statement in the same motion that she had been preoccupied with helping her husband prepare for sentencing.

11. The ALJ held in his dismissal order that the intervenors had "demonstrated that the assertions put forward by [Mrs.] Naleszkiewicz for filing her notice of appearance 45 days late were fraudulent." He concluded that she had not, as represented, failed to file the notice on time because she had been ignorant of the pertinent rule requirement but that, on the contrary, she had received clear expert advice that she would have to file a notice of appearance in December 1990. Further, the ALJ concluded that the appellant had not, as represented, been temporarily without legal counsel at relevant times. Hence, he ruled that the appellant's notice of appearance should not have been accepted and that he should dismiss her application rather than merely add a hearing issue concerning this matter. According to the ALJ, to "disrupt the normal course of this proceeding to consider newly raised character questions would be to countenance Mrs. Naleszkiewicz's abuse of the Commission's processes."

12. In denying an appeal from the dismissal order, the Review Board held that the ALJ's action was warranted on two general grounds. First, the Board said that the ALJ could reasonably conclude from admitted facts and documents of undisputed authenticity that the appellant had tried to deceive the Commission by causing her attorney to declare in the motion for acceptance that she had been ignorant of the need to file a timely notice of appearance and that this deceitful misconduct was so blatant as to constitute contempt warranting summary dismissal. 6 FCC Rcd at 4833 ¶¶ 22-23. Second, the Board agreed that the ALJ could properly rescind his prior order accepting the appellant's notice of appearance and hence dismiss her application for failure to prosecute, because: (a) it had been shown that the excuses that the appellant had given

for the late filing were deceitful; (b) the failure to file a timely notice of appearance was prejudicial to the intervenors; and (c) if the application were not to be dismissed it would be necessary to add a further hearing issue concerning the candor of the appellant's motion for acceptance, which would unduly burden the proceeding. *Id.* at ¶¶ 24-25.

13. The appellant now contends that the Board's opinion must be set aside insofar as it purports to conclude that dismissal is warranted as a "summary vindication of the Commission's authority," *id.* at 4832 ¶ 21, because the Board's holding to that effect is assertedly predicated upon a misinterpretation of the ALJ's rationale for the dismissal order. The appellant's other main contention is that the Board denied due process by concluding that she lied and affirming the dismissal of her application without giving her a chance to defend herself against the charge of deceit in an evidentiary hearing.

DISCUSSION

14. The Commission may deny or dismiss an application because of an applicant's misconduct without a full evidentiary hearing if the misconduct occurred directly before the agency and was so blatant that its existence cannot be denied. *RKO General, Inc. v. FCC*, 670 F.2d 215, 235 (1981), cert. denied, 456 U.S. 927 (1982). That principle does not apply here, for we cannot conclude from the aforementioned documents that the appellant knowingly misrepresented the reasons for the late filing of her notice of appearance. Nor are we persuaded that the appellant has been so derelict in complying with procedural requirements as to deserve dismissal for non-prosecution. We will therefore vacate the dismissal of her application and remand for proceedings consistent with this opinion. We leave it to the ALJ in the first instance to decide whether there is sufficient reason to add a misrepresentation issue against the applicant.

15. *Summary misrepresentation finding as ground for dismissal.* It is quite clear from her letter of January 3 to Sheldon Schuman that the appellant knew by that date that a notice of appearance would have to be entered on her behalf in order to preserve her application. But the evidence that the appellant knew this is not dispositive of the misrepresentation issue, as the ALJ and the Board concluded, for she never alleged that she had been unaware that there was a requirement for the entry of a notice of appearance. Rather, she alleged in her January 30 motion that she had previously been unaware that a notice of appearance was due to be filed *within 20 days of the issuance of the HDO*. The Board failed to address this important point.

16. It has been shown that the appellant was advised in December 1990 that she should have her new counsel file a notice of appearance "as provided in Para. 62 of the Hearing Designation Order" and that the letter containing that advice was sent with an attached copy of the HDO, the cited paragraph of which explains that notices of appearance are due within 20 days. This does not necessarily establish, however, that the appellant read the cited paragraph of the nineteen-page HDO and appreciated its import. Given that she intended to retain substitute counsel to handle the prosecution of her application and that the letter from Fishman did not explicitly alert her to the fact that there was a *deadline* for filing her notice of appearance, it is not inherently incredible that she left it to her substitute counsel to comply with the notice requirement without ascertaining for herself precisely what compliance would entail, as she indicated by her statements.

17. Furthermore, the Board's conclusion that the appellant had been aware of the deadline all along is difficult to reconcile with the fact that her notice of appearance was not filed until some six weeks after the deadline had passed. As it did not point to any concrete evidence that the appellant knew of the deadline in advance, it was incumbent upon the Board to identify some plausible motive for her to have *deliberately* let the deadline pass and then file the notice six weeks late. Yet neither the intervenors, the ALJ, nor the Board has suggested that there was any advantage to be gained by the delay, and it is not evident to us that there was any reason for the appellant to willfully withhold the notice for six weeks past its due date. In this regard, there is no indication in the record that the appellant intended at any relevant time to abandon the application -- on the contrary, Fishman's letter of December 7 and the appellant's letter of January 3 to Schuman indicate that she was intent on pursuing it during the period of time that elapsed between the issuance of the HDO and the late filing of her notice of appearance.[3]

18. Nor has the appellant's allegation that she had retained Schuman to represent her in this proceeding only just prior to January 30 been shown to be false. That allegation is corroborated by the fact that Schuman himself, who obviously had personal knowledge of the approximate date of his engagement, testified to the veracity of a confirming statement in an affidavit attached to the appellant's pleading in opposition to the joint motion to dismiss. ("Opposition to Joint Motion to Dismiss or in the Alternative to Enlarge Issues" filed May 13, 1991, ¶ 7 and p.6.) There is no acknowledgment of Schuman's corroborating affidavit in the decisions under review. Furthermore, the allegation as to the time of Schuman's engagement is supported by the appellant's referenced letter of January 3, which shows that on that date she extended an offer to employ him on certain terms as her counsel in this case, thus indicating that he had not yet accepted the employment. It appears from the appellant's letter of January 24 that Schuman eventually accepted the job only after the appellant paid a cash retainer in the amount of $3,000, in accordance with her explanation that she had been temporarily unable in the interim to secure his services for the purposes of this proceeding because he had insisted on payment of a cash retainer and she had been unable to meet that requirement until she successfully solicited a $5,000 loan from her sister. *Id.* at ¶¶ 8-10. This explanation is also supported by a copy of a receipt for a $5,000 deposit to the appellant's account on January 25, 1991 and a copy of her bank statement showing that a check for $3,000 was debited to her account on January 29, which she submitted with her opposition to the joint dismissal motion.

19. The fact that Schuman had represented Genesis for five years in regard to related matters and consequently was "thoroughly familiar with this case," which the ALJ stressed, is not dispositive. The point at issue is exactly when Schuman agreed to represent the appellant in *this* case, and it appears from the correspondence between them that he was not willing to do so on the basis of any pre-existing arrangement. The statement in Fishman's December 7 letter to the appellant that indicates that

Fishman was under the impression that she had already retained substitute counsel is not dispositive on the question, as the appellant's letter of January 3 to Schuman shows that Fishman was mistaken in that belief.

20. Nor does the present record clearly establish that the appellant lied when she alleged that she had been preoccupied in helping her husband prepare for sentencing. No cogent reason has been advanced for inferring that she was not at least somewhat distracted, in December 1990 and January 1991, from the prosecution of her application by developments in the criminal prosecution of her husband, which culminated in a plea-bargain in January 1991. In sum, there is insufficient support for the peremptory findings below of misrepresentation and lack of candor regarding the appellant's statements concerning the late filing of her notice of appearance.

21. *Procedural derelictions as grounds for dismissal.* The Board erred in relying on *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 142 (Rev. Bd. 1970), as precedent for concluding that if dismissal is not warranted on the basis of summary misrepresentation findings then it is nevertheless required here to avert disruption of the proceeding, as otherwise it would be necessary to add a hearing issue concerning the veracity of the appellant's explanation for the late filing of her notice of appearance. 6 FCC Rcd at 4833 ¶ 24. Even assuming, *arguendo*, that such an issue must be added if the appellant's application is not dismissed, the contention that *O'Conner* is controlling here by analogy ignores material distinctions and loses sight of underlying policy objectives. *O'Conner* holds that a post-designation amendment may not be accepted if it would necessitate the addition of a new hearing issue, a doctrine that fosters administrative efficiency and fairness by denying applicants the prerogative of changing their proposals during the course of a proceeding in such a way as to impose substantial additional litigation burdens upon other parties and this agency. That doctrine does not have any relevance to the question of whether an application should be dismissed for failure to meet a procedural deadline. It is not the Commission's policy to dismiss an application in order to avoid the burden of trying another hearing issue whenever an adversary raises a material character question that cannot be summarily resolved, and we see no cogent reason to do so here just because the character question that the intervenors are pressing concerns the veracity of allegations in a request for waiver of a procedural deadline.

22. The pertinent guidelines are not to be found in *O'Conner*, but instead in precedents concerning waiver of the deadline for filing notices of appearance, which is specified by 47 U.S.C. §1.221(c), and concerning dismissal for failure to prosecute. In this regard, we note that the considerations that militate for strict enforcement of the deadline in comparative cases, where applicants might otherwise flout it for strategic purposes, see *Silver Springs Communications*, 3 FCC Rcd 5049 (Rev. Bd. 1988), rev. den. 4 FCC Rcd 4917 (1989), are not present in this single-applicant proceeding. Thus, it is appropriate to judge the asserted grounds for dismissal for procedural derelictions in accordance with the *Communi-Centre* standard:

> [W]hether there is just cause for dismissal for failure to prosecute [depends on] 'The applicant's proffered justification for the failure to comply . . .. the prejudice suffered by other parties, the burden placed on the administrative system, and the need to punish abuse of the system and to deter further misconduct.

Communi-Centre Broadcasting, Inc. v. FCC, 856 F.2d 1551 (D.C. Cir. 1988). No discernible prejudice to the public or procedural disruption is attributable to the fact that the appellant's notice of appearance was filed late, as the ALJ acknowledged when he initially accepted it. FCC 91M-1025 (rel. Mar. 21, 1991). The delay in filing did not necessitate postponement of any scheduled procedural event. The Board's finding of prejudice to other parties, *id.* at 4833 ¶ 25, is unfounded. There is no indication that the delay in filing the notice of appearance induced detrimental reliance on the intervenors' part, and no one has complained of any specific prejudice on account of it. As for the other procedural derelictions mentioned below, we agree with the Board, *id.* at 4832 ¶ 17, that the appellant's tardiness in answering a single interrogatory is not so egregious in light of relevant circumstances that it can stand alone as a cause for dismissal in this case, and we find that the only other procedural irregularity mentioned below, the filing of an unauthorized pleading, is of even less signficance.[3]

23. ACCORDINGLY, IT IS ORDERED that the application for review filed for Nancy Naleszkiewicz on September 16, 1991 IS GRANTED; that the orders of the ALJ, FCC 91M-1790, released June 4, 1991, and the Review Board, 6 FCC Rcd 4829 (1991), ARE SET ASIDE; and that this case IS REMANDED to the presiding ALJ for further proceedings.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] We also have before us oppositions to the application for review filed by the Chief of the Commission's Mass Media Bureau, The Committee for a Fair Lottery (CFL), and Pacific Nationwide Cellular (PNC).

[2] The indictment charged that the appellant's husband had broken the law by diverting for his personal use funds that Genesis had collected from would-be participants in cellular lotteries and in failing thereafter to keep commitments to file cellular radio applications with the FCC on their behalf. In February 1991, pursuant to a plea bargain, the appellant's husband pled guilty to two counts of mail fraud, and he and the appellant agreed to make restitution to the defrauded investors out of the proceeds of a sale of the cellular construction permit at stake in this proceeding, to be conducted at the first opportunity. *Id.* at 7133. The sale, of course, has yet to occur.

The appellant alleged in connection with her instant application that she had not been involved in, and had no personal knowledge of, the crimes charged against Genesis. The Commission designated her application for a hearing to determine the extent of her involvement in, or knowledge of, the activities of Genesis, and to decide whether she had concealed or misrepresented facts relevant to this matter in communications with the Commission. *Id.* at 7138.

[3] As noted above, the appellant is not pursuing this application in order to obtain a cellular license for herself but instead to secure a construction permit with the intention of assigning it in accordance with a plea bargain commitment to a trustee who would sell it and allot most of the proceeds to compensate victims of the fraudulent acts to which the appellant's husband has pled guilty. Nevertheless, successful prosecution of the application would also serve the appellant's financial interest, as the use of proceeds to compensate fraud victims would relieve her and her husband of restitutional liability that they assumed under the plea bargain. 5 FCC Rcd at 7133 ¶ 18, 7135 ¶ 39.

[4] In *Opportunity Broadcasting of Shreveport*, 7 FCC Rcd _____ (1992), we denied an appeal from a dismissal order in which the appellant argued that its failure to exchange direct-case exhibits and present a key witness for deposition was excusable because of a prolonged hiatus in legal representation that allegedly occurred as a result of difficulties beyond its control. We found that the appellant had failed to show that it had been diligent and that it had still been unprepared to proceed as of the release date of the dismissal order. We do not hold that the delay in filing a notice of appearance in this case is excusable merely because the appellant was temporarily unrepresented; rather, we hold that dismissal is unwarranted because the record does not show that the dereliction was willful, disruptive, or prejudicial, unlike the defaults in question in *Opportunity*.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 18, 1992

COMMISSION AND CANADIAN DEPARTMENT OF COMMUNICATIONS AGREE ON INTERIM CHANNELING ARRANGEMENT FOR THE 136-137 MHZ AERONAUTICAL MOBILE (R) SERVICE BAND

On May 2, 1991 the Commission released a Memorandum Opinion and Order in GEN. Docket No. 89-295. Among other things, it indicated that the proposed frequency sharing arrangement of the 136-137 MHz band, shown in Part 87 of the Rules (Aviation Services) would be discussed with Canada. Those discussions have now been completed. Mr. Ralph A. Haller, Chief of the Private Radio Bureau of the FCC and Mr. Michael Binder, Assistant Deputy Minister of Research and Spectrum of the DOC, have signed a Confirmation of Acceptance concerning the coordinated use of the 136-137 MHz frequency band.

The Federal Communications Commission (FCC) of the United States and the Department of Communications (DOC) of Canada have agreed to an arrangement entitled *U.S./Canada Interim Channeling Arrangement for the Aeronautical Mobile (R) Service Utilizing 25 kHz Channels for the Band 136-137 MHz*. This frequency band is allocated for use by the Aeronautical Mobile (R) Service (AM(R)S) on a primary basis. The FCC and DOC have agreed to make no new assignments after January 1, 1992 to stations of the services to which the band is allocated on a secondary basis and to cease operation of any preexisting stations in such secondary services if their operation causes interference to stations in the AM(R)S.

The Arrangement is of an interim nature pending incorporation into a replacement for the Agreement between the United States and Canada concerning the *Coordination and Use of Radio Frequencies Above 30 Megacycles per Second*.

The effective date of the Arrangement is January 15, 1992.

For further information contact the Chief of the Aviation and Marine Branch of the Private Radio Bureau, at (202) 632-7175.

FEDERAL COMMUNICATIONS COMMISSION

CONFIRMATION OF ACCEPTANCE

The attached arrangement between the Department of Communications of Canada and the Federal Communications Commission entitled U.S/Canada Interim Channeling Arrangement for the Aeronautical Mobile(R) Service Utilizing 25 kHz Channels for the Band 136-137 MHz is accepted as an understanding between ~~our~~ two agencies. This Arrangement will become effective on January 15, 1992 and is to be applied provisionally until the definitive entry into force of a replacement for the Agreement concerning the coordination and use of radio frequencies above thirty megacycles per second, with annex, as amended.

for Michael Binder
Assistant Deputy Minister,
Research and Spectrum
Department of Communications

Date: 15 January 1992

Ralph A. Haller
Chief, Private Radio Bureau
Federal Communications Commission

Date: November 1, 1991

U.S./CANADA INTERIM CHANNELLING ARRANGEMENT

FOR THE AERONAUTICAL MOBILE(R) SERVICE UTILIZING

25 kHz CHANNELS FOR THE BAND 136-137 MHz

1. The provisions of this Arrangement apply to the Federal Communications Commission of the United States and the Department of Communications of Canada (the Administrations) regarding use of the 25 kHz channels in the 136-137 MHz frequency band that appear in paragraph 2 below.

2. These 25 kHz channels are allotted as follows:

Freq. (MHz)	U.S.	CANADA
136.000	X	X
136.025	X	X
136.050	X	X
136.075	X	X
136.100	X	X
136.125	X	X
136.150	X	X
136.175	X	X
136.200	X	X
136.225	X	X
136.250	X	X
136.275	X	X
136.300	X	X
136.325	X	X
136.350	X	X
136.375	X	X
136.400	X	X
136.425	X	X
136.450	X	X
136.475	X	X
136.500	X	X
136.525	X	
136.550	X	X
136.575		X
136.600	X	X
136.625	X	
136.650	X	X
136.675		X

Freq. (MHz)	U.S.	CANADA
136.700	X	X
136.725	X	
136.750	X	X
136.775		X
136.800	X	X
136.825	X	
136.850	X	X
136.875		X
136.900	X	X
136.925	X	
136.950	X	X
136.975		X

Note 1) Frequencies primarily allotted for use by the United States may also be assigned to Canadian stations within the frequency coordination zones listed in Attachment A following successful coordination with the United States.

Note 2) Frequencies primarily allotted for Canadian use may also be assigned to United States stations within the frequency coordination zones listed in Attachment A following successful coordination with Canada.

Note 3) All frequencies listed in paragraph 2 may be assigned without prior coordination outside the coordination zones listed in Attachment A.

Note 4) The frequencies 136.000 MHz through 136.475 MHz allocated for air traffic control (ATC) purposes will be shared on an equal basis without prejudging the needs of either Administration.

Note 5) The frequencies 136.000 MHz through 136.475 MHz will be coordinated on the basis of required technical data as established in the October 24, 1962, agreement entitled "TELECOMMUNICATIONS-Coordination and Use of Radio Frequencies Above 30 Megacycles per Second" and any subsequent revisions thereto.

3. For frequencies 136.500 MHz through 136.975 MHz that are within the frequency coordination zones listed in Attachment A, the Administrations shall coordinate assignments of all frequencies allocated jointly to both Administrations.

4. In adopting this Arrangement, it is understood by the Administrations that: each Administration retains complete flexibility in making use of its channels within the frequency coordination zone(s); the option provided by Notes 1 and 2 of Paragraph 2 should not be exercised unless a requirement cannot be satisfied on a channel allotted to that Administration under the plan; an assignment made under the provisions of Notes 1 and 2 should not be a bar to future use of the channel by the Administration to which it is allocated in paragraph 2 above; consideration shall be given to the overall frequency utilization in the area of the proposed station.

5. Before an Administration assigns a frequency allotted to the other Administration, it shall establish that neither the frequencies primarily allotted to it nor the frequencies allotted jointly are available. Before an Administration requests the return of one of its allotted frequencies, it shall establish that it cannot otherwise meet its operational requirements. Where a determination indicates congestion of equal magnitude, consideration shall be given to the sharing of a frequency on an equal basis by the two countries. In cases where such determination indicates greater congestion in the area of the proposed station, the frequency shall be returned to the Administration to which the channel is allotted.

6. This Arrangement takes cognizance of pertinent provisions promulgated by the 1979 and 1987 World Administrative Radio Conferences (WARC). Specifically, the 1979 WARC reallocated world-wide the use of the 136-137 MHz band, effective 2 January 1990, to the aeronautical mobile (R) service on a primary basis, and to the space operation, meteorological satellite, space research, fixed and other mobile services on a secondary basis. Subsequently, the 1987 Mobile WARC, in Resolution 408, resolved that as of 1 January 1990, administrations operating stations on a secondary basis in this band take steps to protect the aeronautical mobile (R) service. Additionally, the 1987 Mobile WARC requested that as of the same date, administrations refrain from authorizing new assignments to the services to which the band is allocated on a secondary basis. In recognition of the foregoing, the Administrations agree to make no new assignment after January 1, 1992 to stations of the services to which the band is allocated on a secondary basis and to cease operation of any preexisting stations in such secondary services if their operation causes interference[2] to stations of the aeronautical mobile (R) service, to which the band is allocated on a primary basis.

7. This Arrangement shall be subject to review after five years. In this regard, the Administrations shall exchange information as to frequency assignments annually.

8. This Arrangement is of an interim nature pending incorporation into a replacement for the Agreement concerning the Coordination and Use of Radio Frequencies Above 30 Megacycles per Second, with annex as amended.

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[2] See Radio Regulation, International Telecommunication Union (ITU), Sec. VII Sec. 7.1, para. 160 (1982 ed., rev, 1985 & 1986) (Definition of 'Interference').

Attachment A

FREQUENCY COORDINATION ZONES FOR CO-CHANNEL ASSIGNMENTS

Type of Station	Altitude Level (Feet)	CoordinationZone* (Nautical Miles)
Ramp (RT)	Ground Level	50
Helicopter (HO)	0 to 2,000	150
Low Level (LL)	0 to 10,000	250
Mid Level (ML)	0 to 20,000	400
High Level (HL)	Over 20,000	600

* - The Coordination Zone is the distance from the U.S./Canada border.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 90-217

In the Matter of

Establishment of Procedures
to Provide a Preference
to Applicants Proposing an
Allocation for New Services

MEMORANDUM OPINION AND ORDER

Adopted: February 13, 1992; Released: February 26, 1992

By the Commission:

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INTRODUCTION

1. By this action, the Commission addresses petitions for reconsideration of the new "pioneer's preference" rules adopted in the *Report and Order* in this proceeding. These rules provide preferential treatment in our licensing processes for parties developing new communications services and technologies. We are granting in part the petition filed by Ellipsat Corporation (Ellipsat) to permit an innovative party to claim a pioneer's preference for a new communications service or technology without necessarily filing a petition for rule making. We are denying the petitions to modify other pioneer's preference rules filed by the National Association of Broadcasters (NAB), Strother Communications, Inc. (SCI), TV Answer, Inc. (TV Answer), and United Parcel Service, Inc. (UPS). We also are clarifying certain aspects of those rules. The changes adopted herein refine our pioneer's preference program to encourage parties to come forward with innovative proposals for new communications services and technologies.

BACKGROUND

2. The pioneer's preference rules provide preferential treatment in the Commission's licensing processes for parties requesting spectrum allocation rule changes associated with the development of new communications services and technologies.[1] Under the pioneer's preference procedures, a party granted such a preference is effectively guaranteed a license because it is permitted to file a license application without being subject to competing applications. This process is intended to ensure that parties that develop innovative services or technologies and successfully pursue authorization of such innovations in proceedings before the Commission have an opportunity to benefit directly from their efforts.

3. In the *Report and Order*, we stated that we would award a pioneer's preference to a party that demonstrates that it has developed an innovative proposal that leads to the establishment of a communications service not currently provided or a substantial enhancement to an existing service, provided that the rules for the new or existing service follow from the proposal and lend themselves to the grant of a preference and a license to the innovating party. We indicated that a qualifying innovation could be an added functionality, a use of the spectrum different than previously available, or a change in the operating or technical characteristics of a service. We emphasized, however, that we did not intend to routinely grant preferences.

4. We also stated in the *Report and Order* that a party seeking a preference would be required to file a request for a pioneer's preference and a separate petition for rule making requesting either that spectrum be allocated for its proposed new service, or that the rules be amended to accommodate its proposed new technology in an existing service. We stated that in most cases we anticipated that a preference applicant would perform an experiment to provide sufficient information for the Commission to make its determination regarding award of the preference. However, we said that an experiment will not be required as a prerequisite to obtaining a preference and that, when an experiment is not performed, we will require the petitioner to accompany its preference request with a demonstration of the technical feasibility of the new service or technology. We noted that when an experiment had been undertaken and a preference subsequently awarded, the geographic area of the experiment would be a logical location for a license in the authorized service. We emphasized, however, that we would allow a preference recipient to select any one service area for which it desires a licensing preference based upon the definition of licensed service area adopted for the new service. We said that generally we would not award a nationwide preference or a preference for more than a single geographic area.

[1] *See Report and Order*, GEN Docket No. 90-217, 6 FCC Rcd 3488 (1991).

5. We further stated in the *Report and Order* that an initial determination of entitlement to a pioneer's preference would be made at the time a notice of proposed rule making (NPRM) was issued proposing rules for a new service or modifications to rules in an existing service. Finally, we stated that no preference would be awarded in proceedings in which an NPRM addressing a new service or technology had been issued prior to release of the *Report and Order* adopting the pioneer's preference rules.

DISCUSSION AND DECISIONS

Need for More Specific Preference Criteria and Nature of Preference

6. NAB argues that the criteria for a pioneer's preference should be clarified. According to NAB, this will prevent the Commission from being inundated with preference requests and judicial review proceedings initiated by those denied a preference or by competitors to those receiving a preference. NAB also maintains that we should provide specific examples of the kinds of improvements that might warrant a preference. Further, in NAB's view, the preference should at most be comparative rather than a guarantee of a license. NAB asserts that a guarantee of a license would be an excessive benefit and could lead to spectrum requests for unneeded services.

7. *Decision.* As discussed in the *Report and Order*, it is necessary to make the standard for a pioneer's preference as specific as possible to provide guidance to innovators and financial institutions as to when a preference might be granted. However, the standard must be somewhat flexible in order to be applicable to the various types of proceedings in which it might be used. To enunciate an inflexible standard would narrow the scope of the preference to such an extent that some genuinely innovative proposals would not qualify. Such a standard would undermine our goal in this proceeding of encouraging the development of innovative proposals for new radio services and technologies. While we cannot forecast either the number of preference requests or the number of requests for judicial review of our preference decisions, we nonetheless continue to believe that the standard we have established is sufficiently specific without being so inflexible as to undermine its purpose of fostering new spectrum-based technologies and services.

8. With regard to NAB's contention that the preference should be comparative rather than a guarantee of a license, we considered and rejected this argument in the *Report and Order*. A weighted preference would provide no assurance to the innovative party that it would, in fact, receive a license. As we stated in the *Report and Order*, any approach that would permit an innovator to be foreclosed from a license by another party would undermine the value of the preference and thereby fail to accomplish its public interest purpose. Consequently, we affirm that the preference will be dispositive. However, we emphasize that a preference will generally be limited to one geographic area and the preference holder will face competition from other service providers.

Requirement for an Experiment

9. NAB argues that a showing of technical feasibility in lieu of an experiment is insufficient justification for awarding a preference. In NAB's view, requiring only a technical showing could mean that a preference would be based on mere speculation that a service might work and result in technically inferior services, since there would be no mechanism for comparing the technical proposals of applicants competing for a preference. On a related issue, SCI argues that the rules are unclear as to the showing that must be made before the Commission will issue an initial determination that a preference for a particular applicant is warranted. Specifically, SCI argues that the *Report and Order* does not clearly state whether, in situations in which the prospective pioneer also requests experimental authority, a preference will be withheld until those experiments actually have been performed. SCI requests that we clarify this issue by ruling that, while the completion of experiments may be a prerequisite to the final grant of a preference, a conditional preference may be awarded prior to commencement of those experiments.

10. *Decision.* We continue to believe that while performance of an experiment generally will be extremely beneficial, since in most cases a substantially different technology or service will be proposed, it should not be absolutely required as a prerequisite to obtaining a preference. We disagree with NAB that requiring only a technical showing means that a preference could be based on mere speculation that a technology might work and result in technically inferior services. We intend to analyze technical showings as rigorously as the results of experiments to ensure that a preference applicant's proposed new service or technology is viable and worthy of a preference.

11. Regarding SCI's request to clarify our standard, we believe that a preference applicant relying upon an experiment rather than a written technical submission at least must have commenced its experiment and reported to us preliminary results in order to be eligible for award of a conditional preference. If the applicant conducts an experiment to demonstrate the technical feasibility of its proposal, the findings of that experiment will be one of the major components that we will use in determining whether a tentative preference is warranted. If no experimental results are available we would not have the information needed to award a tentative preference. While we recognize that an experimental license applicant may have to wait 90 or more days to have its application approved, there also is a time period between the submission of a preference request and the award of a tentative preference. Therefore, the preference applicant should have ample time to initiate its experiment and obtain at least preliminary results.[2] Accordingly, we find that a tentative preference will not be awarded to an applicant that has not submitted a demonstration of technical feasibility nor commenced an experiment and reported to us at least preliminary results.

[2] Under our revised preference deadline procedure, a preference request must be submitted prior to consideration of the relevant NPRM. *See* paragraph 26, *infra*.

Necessity of Filing a Petition for Rule Making

12. In its petition for reconsideration, Ellipsat maintains that requiring a party to file a rule making petition as a prerequisite for claiming a pioneer's preference could create administrative barriers to innovation and delay introduction of new services. It argues that in some cases companies may find innovative ways to use existing frequency allocations without the need for a spectrum reallocation or rule amendment. As an example, Ellipsat cites its proposal to provide radiodetermination and mobile voice services as an ancillary use of the Radiodetermination Satellite Service bands at 1610-1626.5 and 2483.5-2500 MHz. Ellipsat contends that these services would be a permissible non-conforming use under Commission rules and therefore not require a spectrum reallocation or rule amendment for this use.

13. Ellipsat submits that some innovators might be reluctant to submit their proposals to the Commission if a rule making petition is required solely for the purpose of obtaining a preference. According to Ellipsat, a company that pioneers a new and innovative way to use spectrum that is consistent with the existing rules should be rewarded in the same way as one proposing a reallocation or rule amendment. Ellipsat therefore requests that the Commission eliminate the requirement for a rule making petition or, alternatively, adopt a waiver policy for use in cases in which an innovative use of spectrum has been proposed that is consistent with the existing allocation and rules.

14. Motorola, Inc. (Motorola) supports Ellipsat's petition, stating that it interprets the *Report and Order* to already permit a preference request to be filed without a petition for rule making when no spectrum reallocation or rule amendment is sought. Motorola points out that significant improvements in the use of spectrum often are possible without a rule amendment, and that in such cases requiring a rule making proceeding likely would delay implementation of the innovation. TRW Inc. (TRW) opposes Ellipsat's request, contending that the requirement for a rule making petition establishes a clear distinction between new services or substantial enhancements to existing services, on the one hand, and minor technological advances on the other. According to TRW, the requirement for a rule making petition establishes a practicable threshold for judging the novelty of a proposal; *i.e.*, an idea must require some change in the Commission's existing regulatory scheme in order to be considered pioneering. It argues that any alteration of this threshold test could prompt a flood of speculative preference requests.

15. Issues relating to the filing of a petition for rule making by preference applicants also have arisen in connection with rule making petitions filed by Advanced Wireless Communications, Inc. (AWC) and American Personal Communications (APC) regarding personal communications services (PCS) and by PacTel Paging regarding advanced paging services. These petitions were denied by the Commission's Chief Engineer on the basis that the issues addressed therein already were before the Commission in other proceedings.[3] AWC, APC, and PacTel Paging retained their eligibility for a pioneer's preference because they had submitted experimental license applications related to the relevant Commission proceedings before the July 30, 1991 effective date of the *Report and Order*.[4]

16. *Decision.* Ellipsat's reconsideration petition addresses whether a party proposing to use existing allocations in innovative ways that are consistent with our rules should be required to file a rule making petition. As we have indicated above, this issue also indirectly implicates the corollary issue of whether petitions for rule making are necessary when a new service or technology already is under consideration by the Commission in an existing proceeding. Regarding the first issue, the rules for some services, such as cellular radio and 800 MHz air-ground radiotelephone, allow for operation of a broad range of technical systems and services without the need for modification of the rules.[5] Thus, there are opportunities under our existing regulations for a party with an idea that would make more efficient use of existing allocations to introduce a new technology or service without the need to pursue rule making. These broad operating authorities facilitate and encourage the introduction of new technologies and services. However, in most services the rules contain technical requirements regarding emission bandwidth and signal characteristics that derive from our concern that permitting new modulation techniques to share the band without a thorough examination of the consequences in a rule making proceeding would increase the likelihood of harmful interference to other licensees.

17. For those services in which the rules provide authority for operation of alternative technologies and services, we would expect to grant a pioneer's preference only in an instance in which the degree of improvement in spectrum efficiency or service was significantly beyond that being, or expected to be, developed by others. For services with specific technical and service rules, a rule change almost always would be required to introduce a new technology or service. In view of the fact that grant of a pioneer's preference will almost always be associated with a rule change, we continue to believe it necessary and appropriate to require that a preference application be accompanied by a petition for rule making. Accordingly, we are denying Ellipsat's request that we eliminate the requirement for parties filing an application for a pioneer's preference to also submit an associated petition for rule making.[6]

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[3] GEN Docket No. 90-314 with respect to the petitions of AWC and APC, and RM-7617 with respect to the petition of PacTel Paging. *See* letter of May 23, 1991 from Thomas P. Stanley to Lee Burdick, attorney for AWC; letter of May 23, 1991 from Thomas P. Stanley to Jonathan D. Blake, attorney for APC, request for reconsideration pending; and letter of September 13, 1991 from Thomas P. Stanley to Mark A. Stachiw, attorney for PacTel Paging, request for reconsideration pending.

[4] *See Public Notice*, GEN Docket No. 90-217, 6 FCC Rcd 3720 (1991). Had these parties not submitted such experimental license applications before July 30, 1991, under our current rules they would not have retained their preference eligibility. This exception exists only with regard to experimental license applications filed on or before July 30, 1991, and therefore with the passage of time will be less likely to apply in future cases.

[5] *See* 47 CFR Sections 22.930 (cellular radio) and 22.1111 (800 MHz air-ground radiotelephone).

[6] Nothing in this *Memorandum Opinion and Order* addresses or resolves the issue raised by Ellipsat of whether the Radiodetermination Satellite Service bands may be used for nonconforming radiodetermination and mobile voice services. That issue will be resolved exclusively in the appropriate pro-

18. However, as alternatively suggested by Ellipsat, we will entertain requests for waiver of the petition for rule making requirement in those cases in which a rule change in fact would not be required. In such an instance, we will require the applicant to submit: 1) a pioneer's preference request that includes the information specified in Section 1.402(a) of the Rules except for the petition for rule making; 2) a request for waiver of the rule making petition requirement of Section 1.402(a) that specifically explains how or why no rule change is necessary to accommodate the new technology or service within the requested bands; and 3) a license application in the desired service. Should the waiver request be denied, the requesting party will have 30 days from denial or until the deadline for filing pioneer's preference requests, whichever is later, to perfect its pioneer's preference request by filing a petition for rule making. This preserves a party's rights to be considered for a pioneer's preference request even if it incorrectly interpreted our rules and believed a petition was not necessary in a particular case.

19. With respect to the corollary issue of the necessity of filing a rule making petition for a new service or technology that is already under consideration by the Commission in an existing proceeding, we believe that the policy adopted in the pioneer's preference *Report and Order* should be amended. In some situations several parties may independently be exploring similar new communications services or technologies. Requiring each of these parties to file its own rule making petition unnecessarily burdens both them and the Commission. Therefore, we are modifying the requirement. When a new radio service or technology is under consideration by the Commission in an existing proceeding that has not reached the NPRM stage, and a party that has not filed a rule making petition believes that it is the pioneer of that service or relevant technology, we will not require that it file a rule making petition. Such an applicant will be required to meet all other pioneer's preference filing requirements.[7] As we will still require a substantial showing from the preference applicant, we do not believe that we will receive the flood of speculative preference requests that TRW predicts. Rather, we believe that we will receive preference requests only from those parties who are sufficiently convinced that they are pioneers that they are willing to devote substantial efforts to justifying their entitlement to preferences.

Preference Deadline

20. TV Answer argues that for proceedings in progress when the preference rules were adopted, issuance of an NPRM should not preclude the acceptance of preference applications. UPS goes further, arguing that for such in-progress proceedings, even the issuance of a Report and Order should not preclude a preference.

21. TV Answer observes that the rationale for awarding a tentative preference at the time of issuance of the NPRM is to benefit the innovator by providing early notice to potential financial backers that the innovator is likely to receive a license. TV Answer asserts that when an NPRM had been issued prior to release of the *Report and Order* promulgating the pioneer's preference rules, as was the case with respect to the Interactive Video Data Services proceeding (GEN Docket No. 91-2), the benefits of the preference rules could still be achieved if a preference is awarded at the Report and Order stage.

22. UPS argues that for proceedings in progress, even issuance of a Report and Order should not preclude considering a preference, provided that applications for a new service or significant enhancements to an existing service were pending at the time of adoption of the pioneer's preference *Report and Order*. UPS contends that a nascent service, like the recently adopted 220-222 MHz narrowband service (PR Docket No. 89-552), still requires substantial research and development and that this development could best be encouraged by ensuring that the innovator of that service receives a preference. Further, in UPS's view, the preference policy's vitality and significance would be enhanced by broadening its scope to include those entities that had license applications on file at the time the policy became effective and that had taken a lead in developing new services or technologies and obtaining their authorization by the Commission.

23. *Decision.* The objectives of our pioneer's preference policy are to encourage present and future innovators to submit proposals to the Commission that otherwise would not have been submitted; to decrease regulatory uncertainty for the innovator; and to encourage investors to provide financial support. Our rationale for imposing a deadline at the NPRM issuance stage for receipt of preference requests is that until we make a proposal an innovator may submit a rule making petition or preference request that may become the foundation for our proposal, but after the NPRM is adopted the nature of the proposed new service or technology essentially is defined.

24. We observe that in the proceedings with which they are concerned, both UPS and TV Answer filed petitions for rule making well in advance of the initiation of the pioneer's preference proceeding[8] and that both NPRMs at issue were released in advance of the issuance of the pioneer's preference *Report and Order* on May 13, 1991.[9] The timing of these events makes clear that neither UPS nor TV Answer filed their proposals in anticipation of receiving a pioneer's preference or otherwise relied upon any possibility of receiving a preference. We disagree with

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ceeding to which the issue relates, *see Public Notice* of September 13, 1991, accepting petitions for rule making filed by Ellipsat and American Mobile Satellite Corporation.

[7] As indicated in note 4, *supra*, this policy already applies in existing proceedings in which pioneer's preference applicants had submitted experimental license applications before the July 30, 1991 effective date of the pioneer's preference rules. Since a number of parties had submitted experimental PCS license applications before July 30, 1991, PCS pioneer's preference applications have been accepted from these parties without accompanying petitions for rule making.

[8] The *Notice of Proposed Rule Making* in this proceeding, GEN Docket 90-217, was released April 27, 1990. *See* 5 FCC Rcd 2766. TV Answer's rule making petition was filed on December 2, 1987; that of UPS was filed on November 21, 1988.

[9] The *Notice of Proposed Rule Making* in PR Docket No. 89-552 was released on December 15, 1989, 4 FCC Rcd 8593. The *Notice of Proposed Rule Making* in GEN Docket No. 91-2 was released on March 4, 1991, 6 FCC Rcd 1368. The pioneer's preference *Report and Order* was released on May 13, 1991, and the rules became effective on July 30, 1991.

TV Answer that a preference should be available at the Report and Order stage in proceedings in which NPRMs were issued before the pioneer's preference rules were adopted. In proceedings that reached the NPRM stage before the pioneer's preference policy was adopted, a preference is not needed to encourage submission of the new service or technology to the Commission for consideration. Moreover, with regard to UPS's arguments, if a Report and Order also had been adopted and license applications filed before the preference rules became effective, a preference is even more obviously unnecessary to encourage the new service or technology or to help with financing.

25. We therefore affirm our earlier decision to not award preferences in proceedings in which NPRMs had been issued prior to the effective date of the pioneer's preference rules. We recognize that prior to adoption of the pioneer's preference policy there may have been innovators who may have merited preferences. Our goal, however, is not to reward past innovators, but to encourage future technological innovation and new services by encouraging present and future innovators to submit proposals to the Commission that would otherwise not be submitted. Accordingly, we deny the petitions of TV Answer and UPS.[10]

26. The question of the appropriate timing for accepting preference requests also arises in connection with requests filed after the adoption of an NPRM but before the final text of the decision is released.[11] Under our current rules, a preference request may be filed at any time prior to release of an NPRM in a rule making proceeding that addresses a new spectrum-using service or technology, including the period between the time the decision is adopted and the release of the final text of that decision. This post-decision "window" creates an opportunity for non-innovative parties to file speculative preference requests after being apprised of Commission action in the press release that traditionally is issued on the day of Commission adoption. Further, this policy can lead either to delays in the Commission's consideration of an NPRM or additional administrative action if a preference request is filed immediately before the NPRM's scheduled consideration or immediately after its adoption. Upon further consideration of the appropriate time for terminating the acceptance of preference requests, we find it administratively desirable to impose a deadline for such requests on a specific date prior to the time the Commission adopts an NPRM. This change will provide us sufficient time to consider the pioneer's preference requests in advance of our consideration of an NPRM in a rule making proceeding. We will give public notice of a deadline at least 30 days in advance of the deadline date to permit innovators planning to file preference requests the opportunity to do so. This change will permit us time to evaluate all preference requests more efficiently and fairly without adversely impacting innovative parties.

Area of Preference

27. SCI submits that the Commission should not necessarily use the area for which an innovator receives an experimental license as the basis for a license in an authorized service. According to SCI, this rule provides an incentive for an innovator to choose an experimental area more for its commercial value than for its scientific or technical merit. Also, in SCI's view, the Commission should determine the number of licenses for which an innovator may receive a preference on a case-by-case basis, instead of limiting the applicability of the preference to a single service area. SCI maintains that in services such as digital audio broadcasting (DAB), in which there could be thousands of licenses awarded, a single license would be a meager benefit relative to the investment of a DAB pioneer. SCI therefore recommends that the Commission strive to ensure that all preferences awarded have roughly comparable values regardless of the service involved. Otherwise, in SCI's view, the preference will stimulate only the type of technologies and service offerings in which the number of service providers is limited.

28. *Decision.* The *Report and Order* did not specify that the experimental area must be the preference area. Rather, it stated that the entity receiving a preference would be permitted to select its geographic area based upon the rules promulgated for that service. While we anticipated that the experimental area might be the preference area, we left that selection to the preference recipient, provided that the selection is consistent with the rules adopted. Accordingly, SCI's recommendation on this matter is inapplicable.

29. With regard to the number of licenses an innovator should receive as a proper reward for its efforts, we continue to believe that in general a license in one service area is appropriate. As we stated in the *Report and Order:* "Our goal is to create an incentive for innovation by establishing a certainty that an otherwise qualified applicant will be able to participate in the proposed service."[12] We must balance this goal against our long-standing desire to encourage diversity and competition in communications services. The best way to achieve this balance generally is to limit the preference benefit to a single license. In any particular proceeding, however, we may choose to award a nationwide preference or a preference for more than one service area if there is a compelling reason to do so.[13] We note that when the rules for a service permit, an innovating party would be allowed to obtain additional licenses, albeit on an equal basis with other applicants.

ORDERING CLAUSE

30. Accordingly, IT IS ORDERED THAT the petition for reconsideration filed by Ellipsat Corporation IS GRANTED to the extent indicated herein and otherwise DENIED, and THAT the petitions for reconsideration filed by the National Association of Broadcasters, Strother

[10] Nothing in this proceeding is to be construed as finding or intimating whether or not TV Answer or UPS otherwise would have been eligible to receive a pioneer's preference in the referenced proceedings had the rules applied to them.

[11] Release of the final text of an NPRM typically occurs two to four weeks after the date the Commission adopts the action.

[12] *Report and Order* at para. 54.

[13] With respect to multiple licenses for a DAB pioneer, nothing in this proceeding is to be construed to address this issue in any way. This issue will be addressed at the appropriate time in the DAB proceeding, GEN Docket No. 90-257.

Communications, Inc., TV Answer, Inc., and United Parcel Service, Inc. ARE DENIED. IT IS FURTHER ORDERED THAT under the authority contained in 47 U.S.C. Sections 154(i), 157(a), 303(g), and 303(r), Parts 1 and 5 of the Commission's Rules ARE AMENDED as specified in the Appendix, effective 30 days after publication in the Federal Register, except that the amendment to 47 CFR Section 1.402(c) shall be effective upon publication in the Federal Register.[14]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

I. Part 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 1 - PRACTICE AND PROCEDURE

1. The authority citation in Part 1 continues to read:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

2. Subpart C is amended by revising sections 1.402 and 1.403 to read as follows:

Section 1.402 Pioneer's Preference.

(a) When filing a petition for rule making pursuant to Section 1.401 of this Part that seeks an allocation of spectrum for a new service or that, by use of innovative technology, will substantially enhance an existing service, the petitioner may also submit a separate request that it be awarded a pioneer's preference in the licensing process for the service. Alternatively, if in an existing proceeding in which a notice of proposed rule making has not yet been adopted the Commission is addressing the new service or technology for which an applicant seeks a pioneer's preference, the applicant need not file a rule making petition but only a preference request. Each preference request must contain pertinent information concerning a description of the service to be provided, the applicant's plan for implementing the service, the frequencies it proposes to use, and the area for which the preference is sought, and must address any conflicting licensing rules, showing how these rules should or should not apply. The applicant must demonstrate that it (or its predecessor-in-interest) has developed the new service or technology; *e.g.*, that it (or its predecessor-in-interest) has developed the capabilities or possibilities of the technology or service or has brought them to a more advanced or effective state. The applicant must accompany its preference request with either a demonstration of the technical feasibility of the new service or technology or an experimental license application, unless an experimental license application has previously been filed for that new service or technology. If the applicant files or has filed an experimental license application, it must specify the area in which it intends to conduct its experiment and whether that is the area for which the preference is sought. In determining in its discretion whether to grant a pioneer's preference, the Commission will consider whether the applicant has demonstrated that it (or its predecessor-in-interest) has developed an innovative proposal that leads to the establishment of a service not currently provided or a substantial enhancement of an existing service. Additionally, the preference will be granted only if rules, as adopted, are a reasonable outgrowth of the proposal and lend themselves to the grant of a preference.

(b) A party that believes that it can implement a new technology or service without a rule change may request a waiver of Section 1.402(a) to permit it to file a pioneer's preference request without filing a petition for rule making. The waiver request must explain how or why no rule change is necessary to accommodate the new technology or service within the requested spectrum, and should be accompanied by a license application in the desired service. If the waiver request is denied, a party will have 30 days or until the deadline for filing pioneer's preference requests, whichever is later, to perfect its pioneer's preference request by filing a petition for rule making.

(c) Pioneer's preference requests relating to a specific new spectrum-based service or technology that will be considered by the Commission will not be accepted after a specified date prior to the Commission's consideration of a notice of proposed rule making that addresses the service or technology. This date will be announced by public notice at least 30 days in advance.

(d) An initial determination on a request for a pioneer's preference will be made at the time of the adoption, if any, of a notice of proposed rule making addressing the new service or technology proposed in the request. A final determination on a request for a pioneer's preference and its scope will be made at the time of the adoption, if any, of a report and order adopting new rules. If awarded, the pioneer's preference will provide that the preference applicant's application for a construction permit or license will not be subject to mutually exclusive applications.

(e) Any interested person may file a statement in support of or in opposition to a request for pioneer's preference, and a reply to such statements, subject to filing deadlines that shall be published in the "Public Notice" issued pursuant to Section 1.403. Statements on pioneer's preference requests must be filed separate from, and not part of, any comments on an associated petition for rule making.

(f) In the event of a conflict between this rule and any rule for a particular service that provides for the filing and consideration of competing applications, this rule shall prevail.

[14] The amendment to Section 1.402(c) relates to a matter of agency procedure or practice, and is therefore exempt from the 30-day publication requirement of 5 U.S.C. Section 553(d). We order it effective upon Federal Register publication to prevent delay in the Commission's consideration of pioneer's preference requests in existing proceedings.

Section 1.403 Notice and availability.

All petitions for rule making (other than petitions to amend the FM, Television, and Air-Ground Tables of Assignments) meeting the requirements of Section 1.401 will be given a file number and, promptly thereafter, a "Public Notice" will be issued (by means of a Commission release entitled "Petitions for Rule Making Filed") as to the petition, file number, nature of the proposal, and date of filing. If a petition for rule making includes a request for a pioneer's preference, that request will be separately listed in the Public Notice with a separate file number. If a pioneer's preference request is not accompanied by a petition for rule making, it will be given a file number and a "Public Notice" will be issued (by means of a Commission release entitled "Requests for Pioneer's Preference Filed") as to the preference request, file number, and date of filing. Petitions for rule making and pioneer's preference requests are available at the Commission's Dockets Reference Center (1919 M Street NW, Room 239, Washington, DC).

II. Part 5 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 5 - EXPERIMENTAL RADIO SERVICES (OTHER THAN BROADCAST)

1. The authority citation in Part 5 continues to read:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303. Interpret or apply sec. 301, 48 Stat. 1081, as amended; 47 U.S.C. 301.

2. Subpart E is amended by revising section 5.207 to read as follows:

Section 5.207 Experiments Performed in Conjunction with Pioneer's Preference Applications.

An applicant for a pioneer's preference pursuant to Section 1.402 may file an experimental license application for a limited geographical area, generally including no more than one Metropolitan Statistical Area. In order to be eligible for a tentative preference award at the time of a notice of proposed rule making in a proceeding addressing a new service or technology, the experimental applicant must have commenced its experiment and reported to the Commission at least preliminary results, unless it has also submitted an acceptable showing of technical feasibility.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Application of Group Six Communications, Inc.,
Licensee of Station WWOC-FM
Avalon, New Jersey
for Renewal of License

File No. BRH - 910201WP

MEMORANDUM OPINION AND ORDER AND NOTICE OF APPARENT LIABILITY

Adopted: February 13, 1992; Released: February 21, 1992

By the Commission: Commissioner Quello concurring in the result.

I. INTRODUCTION

1. The Commission has before it (i) the renewal application filed by Group Six Communications, Inc. for station WWOC-FM, Avalon, New Jersey (WWOC); (ii) the licensee's responses to staff letters of inquiry; and (iii) a supplementary letter from the licensee dated October 3, 1991.

II. DISCUSSION

2. Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080, requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance at renewal time, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified women and minorities and the licensee's ongoing assessment of its EEO efforts. The latter enables the licensee to take corrective action if qualified women and minorities are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by a licensee. 47 C.F.R. Sections 73.2080(b), 73.2080(c).

3. When the renewal application indicates a record of adequate EEO efforts, it is granted, if otherwise appropriate. If the application indicates a record of inadequate EEO efforts, the Commission may impose a variety of sanctions or remedies, such as reporting conditions, the submission of a modified EEO program, renewal for less than a full term, monetary forfeiture, or a combination thereof. Further, if substantial and material questions of fact exist, or if we otherwise cannot find that grant of the application would be consistent with the public interest, we will designate the application for hearing. 47 U.S.C. Section 309(e); *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) (*Broadcast EEO), petition for recon. pending*; *see also* 4 FCC Rcd 1715 (1989) (request for clarification by National Association of Broadcasters). *See e.g., Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501, 506 (D.C. Cir. 1988); *Bilingual, supra*.

4. Review of this licensee's EEO record leads us to conclude that grant of the renewal application would be consistent with the public interest. Our review, however, indicates a record of inadequate efforts. We will therefore grant the renewal application but impose sanctions and prospective remedies as detailed herein.

5. Review of the licensee's renewal application, EEO program and inquiry response indicates that the licensee had 26 full-time overall and 24 upper-level hiring opportunities from February 1, 1988, through February 1, 1991. Eleven of the positions were filled during the reporting year, *i.e.*, the 12-month period prior to submitting the EEO program to the Commission. For those positions, the licensee reported in its renewal application that its recruitment contacts included three media sources, five educational institutions, NAACP, NOW, employee referrals, and the County Chamber of Commerce. No minority referrals were reported from these groups. For two vacancies (an announcer and an office manager position) filled prior to the reporting year, *i.e.*, prior to January 1990, the licensee reported in its inquiry response that it contacted the following sources: NAACP, NOW, Chamber of Commerce, local schools and vocational centers.[1] No minority applicants were reported from these contacts. The licensee did not collect referral source information for the remaining 13 vacancies. Likewise, no minority referrals were reported for the remaining 13 positions. For the 26 overall full-time hires over the three-year period, the licensee hired 14 women and 12 men, but no minorities.[2] Of the 24 upper-level vacancies, 13 women and 11 men were hired. The licensee's submissions did not indicate whether any minorities appeared in any of the applicant pools or whether minorities had been interviewed for any positions. According to the inquiry response, the 26 successful hirees were referred from a variety of sources: present employees (eight referrals), former employees (four referrals), unsolicited contacts (seven referrals), newspaper advertisements[3] (four referrals), general manager (one referral), company president (one referral), Stockton State College (one referral). The licensee reported in the inquiry response that it did not record the number of persons who applied for each opening or the number, race or sex of persons who were interviewed. Additionally, it stated that general managers responsible for the station's employment program during the license term "are not available" to provide assistance in ascertaining what recruitment efforts had been taken. Further, the licensee acknowledged that it did not have records identifying which referral sources were contacted for specific openings during much of the three-year period.[4] According to the inquiry response, the information which the licensee provided was based primarily on the knowledge of the current partner/general manager. The licensee explained that minority organizations were rarely contacted because many vacancies were filled by walk-ins and other persons who made unsolicited contact with the station because they were "readily available for work."

6. In its renewal application, the licensee reported that it had received few, if any, referrals from its efforts to attract female and minority job applicants. It stated that most of its referrals have come from newspaper advertisements, announcements on WWOC-FM and current employees. Additionally, it reported that it now has added

these new sources to its referral list to increase the diversity of its applicant pools: Atlantic County Vocational School, Cape May County Office of Employment and Training, Vocational Technical Center, Jersey Cape Diagnostic Training and Opportunity Center, CASA PRAC, Inc., Hispanic Social Service Center.

7. We find that the licensee's performance indicates no evidence of discrimination. However, its performance does reflect inadequate EEO efforts. It appears that over the three-year period, the licensee rarely activated its EEO program, largely relying instead on unsolicited applicants to fill its vacancies. It did not report receiving any applications from minorities or interviewing any minorities for its 26 positions. Of its 26 hires over the three-year period, none were minorities. It neglected to modify its EEO efforts until just prior to filing its renewal application. The licensee also acknowledged that it failed to keep records of the sources contacted for specific vacancies during the license term, or the race and gender of its applicants and interviewees.[5]

8. We find the licensee herein violated Commission rules 73.2080(b)(3), (b)(5), (c)(2), and (c)(5), 47 C.F.R. 73.2080(b)(3), (b)(5), (c)(2), and (c)(5). However, we conclude that the station's EEO record does not raise substantial or material questions of fact sufficient to warrant further inquiry or a hearing. We do find WWOC's case similar to, but more egregious than, the record of stations WTRS/WTRS-FM in *In re Applications of Certain Broadcast Stations Serving Communities in the Miami, Florida Area*, 5 FCC Rcd 4893 (1990), *petition for recon. pending*, in which we imposed reporting conditions and a Notice of Apparent Liability for Forfeiture in the amount of $18,000. The record of WTRS/WTRS-FM, like WWOC, indicated inadequate EEO efforts. Between October 1, 1984 and October 1, 1988, the licensee therein made no attempt to contact minority specific recruitment sources regarding its 37 overall hiring opportunities,[6] notwithstanding that its general sources were unproductive. It did not engage in self-assessment of its EEO efforts until the end of the license term, and its record-keeping was inadequate throughout the license term. Finally, only two of its 37 hires were minorities.

9. WWOC's EEO program has languished under similar neglect. The record reveals that sporadic contacts made with general sources were equally unproductive and that contacts with minority specific recruitment sources to elicit referrals were made for only two of WWOC's 26 vacancies. The licensee kept few records of its recruitment efforts and failed to maintain any records of its applicant and interview pools. Finally, when assessment of its EEO efforts did occur, that assessment was performed late in the license term and did not rely on any objective data to aid the analysis. On balance, we find the record in the instant case to be more egregious than that of WTRS/WTRS-FM because WTRS/WTRS-FM's efforts, though belated, did produce minority applicants and some hires. Therefore, to ensure that better record-keeping and minority recruitment efforts are undertaken, we will impose reporting conditions on WWOC-FM for three years. We also will impose a forfeiture in the amount of $20,000.[7]

10. We note that the $20,000 amount was reached after consideration of the factors set forth in section 503(b)(2) of the Communications Act and the guidelines described in our recently adopted *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. pending*. Under the *Policy Statement*, which applies to behavior occurring after the statutory increases in our forfeiture authority in December, 1989, $12,500 is the base forfeiture for violation of broadcast EEO rules. Because the licensee's actions here constituted a continuing violation up to February 1991, we will increase the forfeiture amount to $20,000.

III. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that the license renewal application for WWOC-FM IS GRANTED subject to reporting conditions.

12. IT IS FURTHER ORDERED, that pursuant to Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. Section 503, this document constitutes a Notice of Apparent Liability for $20,000.

13. IT IS FURTHER ORDERED, that the licensee of Station WWOC-FM[8] submit to the Commission an original and one copy of the following information on February 1, 1992, February 1, 1993, and February 1, 1994:

(a) For each report, a list of all job vacancies during the 12 months preceding the respective reporting dates, indicating the job title and full or part-time status of the position, date of hire, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired. The list should also note which recruitment sources were contacted;[9]

(b) A list of employees as of the January 1, 1992 payroll period for the first report and as of the January 1, 1993 and January 1, 1994 payroll periods for the second and third reports by job title, indicating full-time or part-time status (ranked from highest paid classification), date of hire, sex and race or national origin; and

(c) Details concerning the station's efforts to recruit minorities for each position filled during the 12-month period specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment.

14. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this Memorandum Opinion and Order and Notice of Apparent Liability to the licensee and the assignee to the assignment application.

15. The reports are to be filed with the Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch. *16.* Should you have any questions regarding this action or require further information concerning employment reports, you may call the Mass Media Bureau's EEO Branch at (202) 632-7069. With respect to the forfeiture proceeding, you may take any of the actions set forth in Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, as summarized in the attachment to this letter. Any comments concerning your ability to pay should include those financial items set forth in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Donna Searcy
Secretary

FOOTNOTES

[1] The inquiry response does not confirm the recruitment sources listed in the renewal application. The inquiry response reflects that the NAACP, NOW, Chamber of Commerce, local schools and vocational centers were contacted only in 1988 to fill an announcer and office manager vacancies. We find the licensee's representation in its renewal application regarding its contacts with female and minority organizations, as well as the other referral sources inconsistent due to a lack of adequate record-keeping. *See* note 4, *infra*.

[2] The labor force of the Atlantic City MSA includes 13.2% Black and 2.6% Hispanic. In 1988, the licensee's Annual Employment Report included an overall staff of 11, with ten upper-level employees. No Blacks or other minorities were employed. In 1989, the data for overall, upper-level, Black and minority employment was unchanged from the previous year. In 1990, the staff grew to 13, including 12 upper-level employees. There were no Black or other minority employees.

By letter of October 3, 1991, the licensee requested that it be allowed to use Cape May County labor force statistics rather than the Atlantic City Metropolitan Statistical Area (MSA) statistics in reviewing its EEO program. The licensee admits it is located in the Atlantic City MSA; however, it argues that the Cape May County labor force, including 5.9% Blacks, is more indicative of its employment profile. The Commission has indicated that it would allow the use of alternative data when a licensee justifies this departure with reference to factors like the distance of the station from areas with significant minority population in the MSA, commuting difficulties and the lack of success of previous recruitment efforts. *See In re Application of National Capital Christian Broadcasting, Inc. for Renewal of License of Station WTKK (TV) Manassas, Virginia*, 3 FCC Rcd 1919 (1988) (Manassas); *Broadcast EEO*, 2 FCC Rcd 3967 (1987). Thus, when a licensee provides a reasoned explanation for its use, alternative data will be used to evaluate the licensee's EEO program.

In support of the use of alternative labor force data, the licensee stated: (1) that the commuting distance from Atlantic City to Avalon is approximately 31 miles; (2) that virtually no public transportation exists between Atlantic City and Avalon for the commuting worker; (3) that a profile of most of its recent hires reveals that the majority of its workforce reside in Cape May County (of the 22 full-time hires between January 1, 1988 and January 1, 1991, 19 hirees resided in Cape May County, three resided in Atlantic County). We find that, in the instant case, the licensee has failed to show that the use of Cape May County statistics is more appropriate. While the licensee began to make its case by addressing potential commuting difficulties between Atlantic City and Avalon, it failed to demonstrate that those difficulties are insurmountable. Moreover, the licensee did not explain what efforts it took to attract qualified minority applicants from the Atlantic City MSA, and the results of those efforts. Therefore, there is no indication whether the number of hires from Cape May is in any way reflective of transportation problems between Atlantic City and Avalon or of the licensee's possible failure to engage in best efforts to recruit from Atlantic City. In this latter regard, we have stated previously that "were a licensee to document that, despite extensive recruitment involving use of minority referral sources, it was unable to obtain qualified applicants from areas of minority concentration in the MSA, reference to alternative labor force data would be appropriate." *Manassas, supra*, at 1920. *See also In re License Renewal Applications of Certain Broadcast Stations Serving the Chicago Metropolitan Area*, 89 FCC 2d 1031 (1982); *In re Applications of Certain Broadcast Stations Serving Communities in the States of Indiana, Kentucky and Tennessee*, 54 Rad. Reg.2d (P & F) 1473 (1983). Thus, we do not believe that the licensee has provided an adequate and reasoned basis for using a labor force other than the MSA. Therefore, we will use the Atlantic City MSA labor force statistics in our review of the licensee's EEO program.

[3] We note that the licensee stated that positions were 'routinely' advertised on the air for several weeks. The licensee further states that it used classified newspaper advertisements in the fall of 1989, and the spring and summer of 1990. The licensee is vague as to which media source was used for which specific opening.

[4] In response to a second staff inquiry, the licensee stated that it believed that certain sources were contacted as reported in its renewal application; however, it was unable to document that those sources had in fact been contacted and was hesitant to reiterate them in its inquiry response.

[5] A review of the licensee's seven-year license term employment profile reveals that only one minority (Black) was employed at the station. The employee was reported on the licensee's 1987 Annual Employment Report. The employee did not appear on the 1988 Annual Employment Report.

[6] WTRS/WTRS-FM was located in the Dunnellon MSA which had a labor force consisting of 16.8% minority, including 14.6% Black. The stations reported a total full-time staff of 14 employees.

[7] We note the licensee states that it is experiencing financial difficulties. Under section 503(b)(2)(D) of the Communications Act, a claim of financial hardship could be a mitigating factor to be weighed against the imposition of a forfeiture. On December 13, 1991, the licensee submitted a supplemental letter, Balance Sheet and Statement of Income and Retained Earnings to "request a waiver" of any potential monetary penalty. We find the licensee's submission inadequate because the appropriate supporting documentation was not submitted. For example, absent from the licensee's statement is a payments to principals entry (including salaries, commissions, management fees, interest, rents, etc.). Moreover, among the data submitted was an entry for depreciation which shows funds available to cover a forfeiture. The licensee may, of course, submit more detailed financial information in response to this Notice of Apparent Liability as part of a request for mitigation of the forfeiture.

[8] We note the conditional grant of the assignment application filed by Group Six Communications, Inc. and Ocean Media, Inc., File No. BALH 910723HO. The reporting conditions will follow the license and pass automatically to the assignee. *See Woolfson Broadcasting, Inc.*, 4 FCC Rcd 6160 (1989).

[9] Such a list might start:

1. News Director: Officials and Managers; Full-time.

3 Applicants:	1 White female	A.W.R.T.
	1 Black male	NAACP
	1 Hispanic male	National Hispanic Media Coalition

Sources contacted - Local newspaper, A.W.R.T., NAACP, National

Hispanic Media Coalition

Selected: Hispanic male (08/19/91)

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 2
Contract Tariff F.C.C. No. 2

ORDER

Adopted: February 25, 1992; Released: February 25, 1992

By the Chief, Common Carrier Bureau:

1. On February 12, 1992, AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective February 26, 1992 on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing introduces Contract Tariff No. 2 for Accunet T45 telecommunications service.

2. On February 19, 1992, the Competitive Telecommunications Association (Comptel) filed a petition to reject or, in the alternative, to suspend and investigate Contract Tariff Transmittal No. 2.

3. The Common Carrier Bureau has reviewed AT&T Communications Contract Tariff Transmittal No. 2 and Comptel's petition. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to reject or, in the alternative, to suspend and investigate AT&T Communications Contract Tariff F.C.C. No. 2, Transmittal No. 2, filed by the Competitive Telecommunications Association IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, *Report and Order*, FCC 91-251, released Sep. 16, 1991 (*IXC Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T	Contract Tariff
Communications	Transmittal Nos. 1,
Contract Tariff F.C.C. No. 1	3, and 6

ORDER

Adopted: February 27, 1992; Released: February 27, 1992

By the Chief, Common Carrier Bureau:

1. On February 12, 1992, AT&T Communications (AT&T) filed Contract Tariff Transmittal No. 1 on 14 days notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing introduces Contract Tariff No. 1 for AT&T Megacom Service. On February 24 and 27, 1992, AT&T filed Contract Tariff Transmittal Nos. 3 and 6 which revise Transmittal 1.

2. On February 19, 1992, the Competitive Telecommunications Association (Comptel) filed a petition to reject or, in the alternative, to suspend and investigate Contract Tariff Transmittal No. 1 and US Sprint Communications Company Limited Partnership filed a petition to reject or alternatively suspend and investigate Contract Tariff Transmittal No. 1.

3. The Common Carrier Bureau has reviewed AT&T Communications Contract Tariff Transmittal No. 1 and the appropriate pleadings. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to reject or, in the alternative, to suspend and investigate AT&T Communications Contract Tariff F.C.C. No. 1, Transmittal No. 1, filed by the Competitive Telecommunications Association and the petition to reject or alternatively suspend and investigate Contract Tariff F.C.C. No. 1, Transmittal No. 1, filed by US Sprint Communications Company Limited Partnership ARE DENIED.

5. IT IS FURTHER ORDERED that the effective date of AT&T Communications Contract Tariff F.C.C. No. 1, Transmittal No. 1, IS ADVANCED to February 28, 1992. For this purpose we waive Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, and assign Special Permission No. 92-153.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, *Report and Order*, FCC 91-251, released Sep. 16, 1991 (*IXC Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 28, 1992

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON BELL OPERATING COMPANIES' ONA AMENDMENTS ON NEW TECHNOLOGIES
CC Docket No. 88-2, Phase I

On February 14, 1992, each of the Bell Operating Companies (BOCs) filed further amendments to their Open Network Architecture (ONA) plans pursuant to the *BOC Further Amendment Order*, 6 FCC Rcd 7646.

In the *BOC Further Amendment Order*, the Commission required the BOCs to file further amendments describing how Signalling System 7 (SS7), Integrated Services Digital Network (ISDN), and Intelligent Network (IN) will be unbundled and how the BOCs will unbundle the services provided through these new technologies. The BOCs also were required to explain generally how these services will fit into the ONA framework.

Interested parties should file comments on the unbundling amendment by **March 27, 1992,** and reply comments by **April 17, 1992,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20036. Copies of the amendments can be obtained from Downtown Copy Center at (202) 452-1422. We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

METRO MOBILE CTS, INC.	File Nos. 02870-CL-TC-1-92 through 02893-CL-TC-1-92

For Consent to Transfer Control of 24 Authorizations in the Domestic Public Cellular Radio Telecommunications Service to Bell Atlantic Enterprises International, Inc.

MEMORANDUM OPINION AND ORDER

Adopted: February 28, 1992; Released: March 3, 1992

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. This Order disposes of three petitions to deny filed with respect to the above-captioned applications requesting Commission consent to the transfer of control of twenty-four cellular radio authorizations from Metro Mobile CTS, Inc. (Metro Mobile) to Bell Atlantic Enterprises International, Inc. (Bell Atlantic) and grants the applications in question. Chenoweth & Faulkner, Inc. (Chenoweth) filed a petition to deny all of the captioned applications. Our Order denies Chenoweth's petition. McElroy Electronics Corporation (McElroy) filed a petition against the application (File No. 02886-CL-TC-1-92) for Commission approval of the transfer of control of Station KNKA303 in the Phoenix, Arizona Metropolitan Statistical Area (MSA). As explained in this Order, we grant McElroy's petition in part and deny it in all other respects and grant the transfer application for Phoenix. Lastly, Radio Enterprises of Ohio, Inc. (REO) has filed a petition to deny the application (File No. 02893-CL-TC-1-92) for Commission consent to the transfer of control of Tucson Cellular Telephone Company, which is the licensee of cellular radio Station KNKA340 in Tucson, Arizona. This Order denies REO's petition and grants permission to transfer control of the Tucson license.

II. DISCUSSION

A. Chenoweth's Petition

2. Chenoweth is engaged in the business of providing advertising and public relations services. Chenoweth has a federal lawsuit pending against Metro Mobile entitled *Chenoweth & Faulkner, Inc. v. Metro Mobile CTS, Inc.*, 87 Civ. 6294 (MJL) (S.D.N.Y.). It includes claims that Metro Mobile has, *inter alia*, refused to reimburse Chenoweth for payments it had made to place advertisements in various forms of mass media and to pay Chenoweth its fees for purchasing those advertisements, engaged in tortious interference with Chenoweth's contractual relations and defamed Chenoweth. Chenoweth alleges that the foregoing misconduct has resulted in substantial monetary damage to Chenoweth and serious harm to Chenoweth's business reputation. Chenoweth contends that Metro Mobile should not be allowed to profit from the proposed transfer of control of its cellular radio systems while avoiding its debts to Chenoweth and refusing to compensate Chenoweth for damages caused by Metro Mobile's alleged intentional misconduct.

3. Traditionally, the Commission has refused to become embroiled in private disputes which can be resolved in courts of law. *See, e.g., Regents of the University System of Georgia v. Carroll*, 338 U.S. 586, 602 (1950); *Robert L. Kile*, 5 FCC Rcd 513, 514 (1990) and *Mid-Texas Broadcasting, Inc.*, 71 FCC 2d 1173 (1979). We find that the allegations raised by Chenoweth fall within the category of matters which can be resolved adequately in state or federal courts. The allegations fail to raise a prima facie case that either Metro Mobile or Bell Atlantic is not qualified to be a Commission licensee. Therefore, we deny Chenoweth's petition.

B. McElroy's Petition

4. In its petition filed against the application (File No. 02886-CL-TC-1-92) seeking Commission approval of the transfer of control of cellular radio Station KNKA323 in the Phoenix, Arizona MSA from Metro Mobile to Bell Atlantic, McElroy requests that the Commission condition any grant of that application upon the outcome of McElroy's pending appeal in *McElroy Electronics Corporation v. FCC*, No. 91-1545, before the United States Court of Appeals for the District of Columbia Circuit. Specifically, McElroy is concerned about Metro Mobile's recently granted authorization (File No. 02521-CL-MP-89, granted by *Public Notice*, Report No. CL-92-5, released October 9, 1991) to expand its Cellular Geographic Service Area (CGSA) by three cells into areas for which McElroy had also filed. McElroy's application for those areas was dismissed by an Order of the Chief, Common Carrier Bureau, released April 10, 1989, entitled *Cellular Applications for Unserved Areas in MSAs/NECMAs*, 4 FCC Rcd 3636 (1989) (*April Order*). McElroy filed a petition for reconsideration of the *April Order*, which was denied by the Commission in its *First Report and Order and Memorandum Opinion and Order on Reconsideration*, 6 FCC Rcd 6185 (1991) (*First Report and Order*). McElroy has filed a Notice of Appeal of the Commission's denial of McElroy's petition for reconsideration in its *First Report and Order*, which is pending before the United States Court of Appeals for the District of Columbia Circuit (*McElroy Electronics Corporation v. FCC*, No. 91-1545).

5. Bell Atlantic and Metro Mobile interpose no objection to conditioning the grant of their transfer application for the Phoenix, Arizona MSA upon whatever action the Commission may take as a result of McElroy's above-referenced court appeal. We believe that McElroy's recommended condition is appropriate in this instance. Therefore, our grant of the transfer of control application for the Phoenix, Arizona MSA from Metro Mobile to Bell Atlantic is conditioned upon whatever action the Commission may take as a result of McElroy's pending appeal in *McElroy Electronics Corporation v. FCC*, No. 91-1545 (D.C. Cir., filed November 18, 1991).

C. REO's Petition

6. REO holds a 5.882 percent partnership interest in the Tucson Cellular Telephone Company ("the Tucson Partnership"), which is the licensee of the non-wireline cellular radio system in the Tucson, Arizona MSA. Metro Mobile CTS of Tucson, Inc., a wholly-owned subsidiary of Metro Mobile, has an 88.24 percent interest in the Tucson Partnership. Bell Atlantic has agreed to acquire the ownership interest of Metro Mobile CTS of Tucson, Inc. REO makes several objections to the transfer of control application for the Tucson, Arizona MSA (File No. 02893-CL-TC-1-92) by which Bell Atlantic seeks Commission consent to obtain the controlling interest of Metro Mobile CTS of Tucson, Inc. in the Tucson Partnership. First, REO asserts that the application and the public notice listing the application as acceptable for filing (Report No. CL-92-25, dated December 3, 1991) are defective because they state that Bell Atlantic Enterprises International, Inc. (Bell Atlantic), is the transferee. REO claims that Bell Atlantic Corporation (BAC), which is the ultimate parent corporation of Bell Atlantic, should have been listed as the transferee in the application and the referenced public notice and that officers of BAC rather than Bell Atlantic should have signed the application and the related FCC Form 430 which is entitled "Licensee Qualification Report."

7. The foregoing arguments of REO are without merit. The Commission has frequently granted transfer applications for cellular facilities naming wholly-owned subsidiary corporations as the transferees. *See, e.g., James F. Rill*, 60 RR 2d 583 (1986), which approved the transfer of a San Diego, California cellular radio license and related facilities to New Vector Communications, Inc., which is "the cellular subsidiary of US West." The Commission's practice of approving transfers to subsidiaries is reflected by FCC Form 430, *supra*, and FCC Form 490 ("Application for Assignment or Transfer of Control under Part 22"), which require an applicant to disclose information with respect to "controlling entities." In the case before us, BAC was listed as the controlling entity on both FCC Forms 490 and 430.

8. REO also alleges that Bell Atlantic has not demonstrated its financial qualifications to consummate the sales transaction involving cellular authorizations in 24 markets. REO observes that BAC will assume about $874 million in debt from Metro Mobile as a result of the foregoing sales transaction and provide consideration of about $1.615 billion for Metro Mobile's assets.[1] REO claims that Bell Atlantic's application does not contain an adequate explanation of how those costs will be met. We reject REO's allegations. Exhibit II of the Tucson, Arizona transfer application explains that Metro Mobile's licenses will be transferred to Bell Atlantic through a stock-for-stock exchange by which shareholders of Metro Mobile will receive shares of BAC. It would appear that this type of acquisition should not require the same type of "reasonable assurance" showing which is required in cash transactions. Nevertheless, Bell Atlantic has demonstrated adequate funding for the sales transaction. Thus, BAC will assume Metro Mobile's outstanding debt of about $874 million and may have to provide some extra funds or "adjustments" to close the 24-station deal with Metro Mobile.[2]

9. BAC's balance sheet submitted as part of Exhibit II of the Tucson, Arizona transfer application demonstrates that BAC has sufficient total assets to meet the Commission's total assets ratio test set forth in *American Cellular Corp.*, 103 FCC 2d 26, 30-31 (1986). BAC has total assets of $27,995,000,000, which is more than 32 times the total amount of Metro Mobile's outstanding debt. *American Cellular Corp., supra*, states that a 14 to 1 ratio of total assets to debt is sufficient to demonstrate an applicant's financial qualifications. It is clear that BAC has more than sufficient assets to assume Metro Mobile's outstanding debt and pay any "adjustments" which might arise at the closing of the proposed merger of Metro Mobile into Bell Atlantic. Further, even if the total cost for the Metro Mobile transaction were the $2.5 billion claimed by REO, *i.e.*, $1.6 billion in shareholder equity plus $900 million in debt, the referenced BAC balance sheet demonstrates a total assets to debt ratio of about 11 to 1, which exceeds that previously found sufficient to demonstrate financial qualifications under Section 22.917 of the Commission's rules. *See Timothy Donald Engelgau*, 2 FCC Rcd 6909, 6910 (1987) (9 to 1 ratio sufficient). Thus, Bell Atlantic has demonstrated its financial ability to consummate the transfers contemplated by the proposed merger of Metro Mobile into Bell Atlantic.

10. Section 22.40(b) of the Commission's rules provides that the sale of a cellular construction permit will only be permitted if a showing is made that the transferor is not speculating in cellular licenses. At the time Metro Mobile filed its 24 applications seeking approval to transfer 24 cellular radio authorizations to Bell Atlantic, four of these authorizations were construction permits which Metro Mobile had recently purchased. In this light, REO argues that Metro Mobile should have provided showings pursuant to Section 22.40(b) of our rules with reference to those four construction permits. Each of the four transfer applications in question explained that the applicants planned to construct the facility in question and place in it operation prior to transferring control of the facility to Bell Atlantic. Further, in each of the four markets, initial construction has now been completed, the initial FCC Form 489 has been filed, and commercial operations have been commenced. In brief, none of the transfer applications before us involve the sale of a "bare" (*i.e.*, unconstructed) construction permit. Rather, all the transfer applications concern ongoing operations. Therefore, Section 22.40(b) of our rules is not applicable here.

11. REO claims that it has discovered facts suggesting that Metro Mobile may have relinquished exclusive operational control over its licensed cellular systems. First, REO notes that an official of Bell Atlantic Mobile Systems, Inc. (BAMS) attended a meeting of the Tucson Partnership's Partners' Committee in November 1991. Second, BAC stated that Metro Mobile had begun to convert its systems to equal access as part of the "Request of Bell Atlantic for a Waiver Amendment to Provide Management Services to Cellular Systems throughout the United States," No. 82-0192 (HHG) (D.D.C. October 6, 1989).[3] The foregoing facts do not indicate that Metro Mobile has relinquished control over its licensed cellular systems. Mere attendance at the partners' committee meeting in November 1991 does not indicate a premature transfer of control, nor has REO even alleged that the BAMS official did or said anything at this meeting to indicate that Bell Atlantic was exercising control over the Tucson Partnership. *See Guidance Regarding Questions of Real Party in Interest and Transfers of Control*, 1 FCC Rcd 3 (Com. Car. Bur. 1986). Further, with regard to Metro Mobile's work on converting its cellular systems to "equal

access," Metro Mobile and Bell Atlantic explain that Metro Mobile has begun "make-ready" work for conversion to equal access because the actual conversion will involve long lead times.[4] We agree that where a licensee maintains day-to-day control, which appears to be the case here, there is no premature transfer of control merely because the licensee takes certain actions in anticipation of a proposed transfer in consultation and cooperation with the proposed transferee. *See, e.g., Radio WAVS, Inc.*, 52 RR 2d 1231, 1241 (1982) and *KLBS-FM, Inc.*, 51 RR 2d 93 (1982).

12. Lastly, REO contends that Metro Mobile has managed the Tucson Partnership in total disregard of its fiduciary obligations to its partners; that it received $1.9 million in management fees from the Tucson operations while its minority partners received nothing; and that it stands to make a windfall profit from transferring control of a cellular system and business to which its partners have made large capital contributions, while the minority partners will receive nothing from the transfer. Further, REO states that it was advised at a partners' committee meeting of November 15, 1991 that there would be no operational changes after the Bell Atlantic merger and that no capital distributions were anticipated in fiscal year 1992. REO asserts that the foregoing financial injuries can be redressed if the Commission exercises its plenary authority over BAC and all its contractual arrangements pursuant to Sections 201(b), 205(1) and 211(b) of the Communications Act of 1934, as amended, (the Act) to require BAC to provide copies of all agreements relating to the Tucson Partnership or the Tucson cellular system. REO argues that such documents would assist the Commission in determining (1) whether BAC would comply with the structural separation requirements of Section 22.901 of the Commission's rules and (2) whether BAC's management practices would be unjust and unreasonable, under Section 201(b) of the Communications Act, as they affect the ownership interests of the Tucson Partnership's minority partners, including REO.

13. In response to the foregoing request, Metro Mobile and Bell Atlantic claim, *inter alia*, that REO already has all the relevant documents, including the partnership agreement and the management agreement applicable to the Tucson system, as well as the merger agreement pursuant to which Bell Atlantic will acquire control of the Tucson Partnership. Further, Metro Mobile and Bell Atlantic assert that REO has not provided any basis for implying that BAC's proposed acquisition of Metro Mobile's cellular operations might not comply with the structural separations or other Commission requirements. Metro Mobile and Bell Atlantic argue that REO's Section 201(b) argument is unsound because that section of the Act governs the relationship between a communications carrier and its customers, not the relationship between constituent partners of a carrier. We agree with the foregoing analysis of Bell Atlantic and Metro Mobile.

14. We do not believe that REO has raised any serious questions as to whether Bell Atlantic would comply with the Act or Commission rules and policies. Further, we find that REO's accusations concerning the past practices of Metro Mobile vis-a-vis its minority partners in the Tucson Partnership are the types of dispute which should be decided in a court of law. *See Mid-Texas Broadcasting, Inc.*, 71 FCC 2d 1173 (1979) and *Robert L. Kile*, 5 FCC 2d 513, 514 (1990). In this regard, it appears that any injury to REO could be satisfied by the payment of damages awarded by a court. *See* 71 FCC 2d at 1174. None of REO's allegations adversely implicate Metro Mobile's or Bell Atlantic's qualifications to hold a communications license.

15. We have reviewed all of the captioned transfer of control applications and we find Bell Atlantic Enterprises International, Inc. fully qualified to be the licensee of each cellular system for which it seeks to obtain the controlling interest of Metro Mobile CTS, Inc. or its subsidiary.

III. ORDERING PARAGRAPHS

16. Accordingly, IT IS ORDERED that the petitions to deny filed by Chenoweth and Faulkner, Inc. and Radio Enterprises of Ohio, Inc. ARE DENIED.

17. IT IS FURTHER ORDERED that the petition to deny filed by McElroy Electronics Corporation IS GRANTED to the extent indicated herein and IS DENIED in all other respects.

18. IT IS FURTHER ORDERED that the applications which have File Nos. 02870-CL-TC-1-92 through 02885-CL-TC-1-92 and 02887-CL-TC-1-92 through 02893-CL-TC-1-92 and which seek Commission consent to the transfer of control of authorizations in the Domestic Public Cellular Radio Telecommunications Service from Metro Mobile CTS, Inc. to Bell Atlantic Enterprises International, Inc. ARE GRANTED.

19. IT IS FURTHER ORDERED that the application (File No. 02886-CL-TC-1-92) for Commission consent to the transfer of control of Station KNKA303 in the Phoenix, Arizona MSA from Metro Mobile CTS, Inc. to Bell Atlantic Enterprises International, Inc. IS GRANTED, subject to whatever action the Commission may take as a result of the appeal in *McElroy Electronics Corporation v. FCC*, No. 91-1545 (D.C. Cir., filed November 18, 1991).

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] *See* page 25 of REO's petition to deny.

[2] Footnote 63, page 25 of REO's petition, observes that page 3 of the Form 10-K provided by Metro Mobile to the Securities and Exchange Commission indicates that the total consideration due to holders of Metro Mobile common stock if the contemplated merger of Metro Mobile and Bell Atlantic occurs would amount to about $1.615 billion payable in the form of Bell Atlantic common stock and rights "subject to adjustments (which may be substantial) at closing."

[3] REO observes that, in the Tucson transfer application, Bell Atlantic indicates that such modifications to Metro Mobile's facilities "will be made where necessary to comply with the MFJ [Modified Final Judgment] prior to consummation." (Exhibit II, p.3 n.3 of the application.) REO argues that the foregoing statement is inconsistent with BAC's above-referenced representation in its MFJ waiver request and that either Bell Atlantic

or BAC has been less than candid concerning the status of the "equal access" modifications. We do not think that the two quoted statements are inconsistent. The MFJ filing reported that the conversion process had been initiated and the transfer application states that it would be completed prior to closing.

[4] *See* page 10 of the Joint Opposition to Petition to Deny filed January 21, 1992, by Metro Mobile and Bell Atlantic.

*U.S. Government Printing Office: 1992 — 312-024/60013